United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

76-7042

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United States Court of Appeals

For the Second Circuit

Taxi Weekly, Inc.,

Plaintiff-Appellee,

against

Metropolitan Taxicab Board of Trade, Inc., Hosynd Publications, Inc., Jack Plotsky, Estate of Morris Heit, Estate of George McIntyre, Alfred Zeff, Morris Lefkowitz, Milton Marks, Leon Murstein, Gerald Naren, Ira Suchman and Leonard Schaffran,

Defendants-Appellants,

and

Taxicab Bureau, Inc., Empire Taxicab Cooperative, Inc., Independent Taxicab Owners Guild, Inc., United Taxi Owners Guild, Inc., Benjamin Botwinick, Salvatore Baron, Estate of Alfred J. Marks and Estate of Nathan Levine,

Defendants.

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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THE COURT: Why don't you start. You have got Nathan Levine.

MR. PRATT: That's right.

THE COURT: Nathan Levine is one of the defendants who is dead, right? And the estate is represented by Mr. Dinkes.

MR. DINKES: Right.

MR. PRATT: This is the deposition of Nathan Levine taken on July 7, 1969. The questions are by Mr. Geller, beginning on page 2 at line 24.

"Q Mr. Levine, are you an owner of a fleet or fleets of taxicabs in New York City?

"A Yes, sir.

"Q Do you own these taxicabs individually or through corporations?

"A Through corporations.

"Q What are those corporations?

"A 57th Street Management Corporation, Yankee Service Corporation, and 6th Street Management Corporation."

Turning to page 22, line 3.

MR. DINKES: If your Honor please, just so I will know the ground rules, should I interrupt in between or shall I read after he is all finished?

THE COURT: It is a lot better to read at this point.

MR. DINKES: There is a lot of material between 2 and 22 that I would like to read to the jury.

THE COURT: Read it right now. Incidentally, what was the date of death?

MR. DINKES: July 1st, 1973.

THE COURT: All right.

MR. DINKES: Page 5, line 10.

"Q What office or positions do you hold in these three corporations?

"A President."

THE COURT: This doesn't mean anything, all the presidentship, sole stockholder. He has omitted it and for good reason.

MR. DINKES: I don't think so.

"Q Are you the sole stockholder?

"A I am not."

THE COURT: I am not going to have all this technical business. It means nothing in this case.

MR. DINKES: Page 6, line 18.

"Q Who was Sidney Levine?

"A Brother."

Line 20.

"Q Is he a stockholder in each one of these corporations?

"A Yes, he is a stockholder.

"Q Is he also a director in each one of these corporations?

"A Yes, sir.

"Q Is he also an officer, and if so, what office does he hold?

"A Secretary."

THE COURT: All right. Anything else?

MR. DINKES: Page 10, line 20.

"Q Are you individually a member of the Metropolitan Taxicab Board of Trade, Inc.?

"A What year?

"Q As of now, today."

And just to refresh, I think this was in 1969.

"Q To start with, are you now a member?

"A Yes. I just joined last month.

"Q Were any of your organizations that you were affiliated with, such as 57th Street Management Corporation, members of the Metropolitan Taxicab Board of Trade?

"A No, sir."

MR. PRATT: Your Honor, before he goes on, could we read something that was skipped on that page.

MR. DINKES: I'm sorry. I will go back. Line 5.

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"Q Is that the first time you were a member?

"A I believe it was '65.

"Q Were you a member in '65?

"A '66.

"Mr. Coffee: This was the year, 1966."

THE COURT: Let's not read Mr. Coffee.

MR. DINKES:

"Q When you say the fiscal year do you know when that starts and when it ends?

"A June to July -- something like that."

THE COURT: Did you read any of Mr. Coffee's statements?

MR. DINKES: Just the words fiscal year 1966, 1967.

THE COURT: How do you read Mr. Coffee? Who was Mr. Coffee? Was he sworn at the time?

MR. DINKES: I think he was just trying to clarify the record.

THE COURT: Let's read the testimony of the witness and exclude the attorney's statements, please.

MR. DINKES: I think it clarifies it there, your Honor.

THE COURT: He has no right to clarify it. Beginning with line 5 read it again and exclude counsel's statements.

MR. DINKES: Do you see line 13 where the attorney makes a statement there, your Honor, I think that's perfectly admitted and conceded and that's the fact.

THE COURT: It is stipulated. Okay. I don't want to waste time but I don't want attorneys' colloquy read in as part of the evidence. If you have got a stipulation, okay.

MR. DINKES: Will you stipulate to that?

MR. PRATT: I don't have the stipulation in front of me. I just don't know.

THE COURT: Subject to any further stipulation, the witness' testimony was as follows:

"A I just joined last month.

"Q Is that the first time you were a member?

"A I believe it was '65.

"Q You were a member in '65?

"A 1966.

"Q When you say the fiscal year, do you know when that starts and when it ends?

"A June to July, something like that.

"Q Were any of your organizations that you were affiliated with, such as 57th Street Management Corporation, members of the Metropolitan Taxicab Board of Trade?

"A No, sir."

MR. DINKES:

"Levine

"Q At any time, that is apart from you individually.

"A Not that I know of.

"Q How about your brother Sidney, was he a member, to your knowledge, at any time?

"A I am the only member. I was the only member.

"Q In the period of time that you were a member, and as I understand it, that would take in fiscal 1966 and the present time, do you hold any office or other position in the organization, that is, in Metropolitan?

"A No, sir.

"Q Did you, in fiscal 1966 attend meetings of the Metropolitan?

"A Sometimes.

"Q Were they meetings of directors?

"A No, sir.

"Q Just membership, just meetings of members?

"A Membership.

"Q When you say sometimes, how often in that year did you attend?

"A Maybe twice a year."

Page 14, line 25.

"Q Just so that we have the last question clear in your mind, Mr. Levine, I am referring to the fare increase. Was there a ten-cent increase on the first drop only, the one that occurred in the Wagner administration?

"A I had nothing to do with it.

"Q I am asking you what your own position on it was, whether you were in favor of it or, if not, what your position was.

"A (No answer.)

"Q Were you for it or against it, or if you have some qualification you wish to make on those two simple answers. I take your qualification.

"A I was for the ten cents to remain as a fare, not as a tax.

"Q You were then, as I understand it, you correct me if I am wrong, you were for the increase of ten cents on the starting drop from 25 cents to 35 cents?

"A No, I was not.

"Q What were you for?

"A The ten cents was in and then it was dropped. They took the tax off. The ten cents remained on the clock.

"Q We are talking only about the fare increase, not about the tax at all. This is the fare increase from 25 cents to 35 cents on the starting drop.

"A Yes. I was for the ten cents to remain on the clock.

"Q Are you referring to the ten cents that was the increase from the 25 cents starting drop to the 35 cents starting drop? Were you in favor of that?

"A I was for the ten cents remaining as an increase of fare. The first ten cents would be our fare.

"Q Did you at the time that the increase was being discussed talk about it with the other two owner fleets in New York City? Did you talk about it with other fleet owners?

"A About what?

"Q Did you talk about the subject at the fare increase?"

MR. PRATT: Of the fare increase.

MR. DINKES: At the.

"A At the meetings we had."

THE COURT: Read beginning 18. It's a little garbled.

MR. DINKES:

"Q Did you talk about the subject of the fare increase?

"A At the meetings we had.

"Q Did you talk about it only at the meeting of the Metropolitan Taxicab Board of Trade?

"A That's all."

THE COURT: Wait a minute. You said at the

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meetings.

MR. DINKES: Meeting.

THE COURT: It was singular, so read beginning --

MR. DINKES:

"Q Did you talk about it only at the meeting of the Metropolitan Taxicab Board of Trade?

"A That's all."

THE COURT: Now read --

MR. DINKES:

"Q You never talked about --"

THE COURT: I am sorry. I just don't want the record garbled. You read on line 20 "meetings," plural.

MR. DINKES: At the meeting we had. I'm sorry.

"Q You never talked about it with any other fleet owners at any other time while the fare increase was under discussion and consideration?

"A Not to my knowledge.

"Q Just so we are clear, what meeting are you talking about when you say you were talking about the taxicab fare increase at a meeting?

"A We had a few meetings during the year. Metropolitan had a few meetings during the year, membership meetings. They called me to the meeting.

"Q This was before you were a member?

"A Sometimes I went there before I was a member.

"Q Were those meetings of members or meetings of directors?

"A Sometimes it was a meeting of members and they used to take in the non-members into the meeting.

"Q Did you ever meet with the directors as far as you know?

"A No, sir.

"Q How many people attended these meetings to which you are referring? I am talking about the ones on the taxi fare increase.

"A General meeting.

"Q More than 50 people?

"A Sometimes more, sometimes less.

"Q Was it ever a small group of less than 25?

"A It was always more than that."

That's all I have.

THE COURT: All right, go ahead, Mr. Pratt.

MR. PRATT: Page 22 at line 3.

"Q Was there a time when your taxi organizations purchased only Checker cabs?

"A Certain times, yes.

"Q When was the last date on which you purchased Checker cabs exclusively? What year?

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"A I think it was 1965."

Turning to page 23, beginning at line 11.

"Q In that year did you switch to Dodge taxis?

"A That's right.

"Q Did you thereafter purchase Dodge taxis exclusively?

"A That's right.

"Q Through what company did you purchase your Dodge taxis?

"A Future Motors.

"Q Did you know Frank Zeiler of the Chrysler Company?

"A I met him.

"Q Did you do business with him?

"A No.

"Q Did you talk with him from time to time?

"A I used to talk to him now and then.

"Q When you first came to deal or to buy Dodge taxis for your fleets was Zeiler the man you met with?

"A No, sir.

"Q Who was that?

"A Harold Peterfreund, Future Motors."

Now turning to page 34, line 18.

MR. DINKES: Mr. Pratt, could you just wait and let me see if I have anything between now and then.

(Pause.)

THE COURT: You are going to 34, Mr. Pratt?

MR. PRATT: That's right. Mr. Dinkes is reading before that.

(Pause.)

THE COURT: You go ahead. Mr. Dinkes can pick up when he decides.

MR. DINKES: I see page 31.

THE COURT: All right.

MR. DINKES: Line 22.

"Q I am not limiting it to operators. Did you hear from any other persons that Morris Marken was behind Les Peterman in Taxi Weekly?

"A No, I never did.

"Q Did you know of any rumor or statement that was making the rounds to the effect in 1965 and 1966 that Morris Marken was behind Les Peterman and Taxi Weekly?

"A I don't know of any rumors. I didn't hear of any rumors."

THE COURT: Okay.

MR. PRATT: Page 34, line 18.

"Q Will you tell us what was your reason for canceling your subscription."

And this refers to Taxi Weekly.

"A First of all, there was one subscription that came in that the newspaper was against the fare increase. Secondly, there was a piece in that paper about organizing the unions. That's about it."

MR. DINKES: For clarification, your Honor, could you just tell the jury the date of the cancellation of the subscription. It is stipulated.

THE COURT: Well, I think that is stipulated but we don't have it in yet. Can you remember that, Mr. Pratt? What do you say it is?

MR. DINKES: November 14, I believe, 1964.

THE COURT: We'll take that.

MR. DINKES: Effective issue November 21 or 23.

THE COURT: We'll take that subject to correction.

MR. PRATT: Page 37, line 23.

"Q What was the position of Taxi Weekly that was different from yours with respect to benefits to drivers?

"A Organizing in the union drivers.

"Q They were for the organization?

"A That's correct."

That's all that we have from Mr. Levine's deposition.

THE COURT: Just one second. Where did you stop?

MR. PRATT: On page --

THE COURT: 34. You began at 18 and where did you stop then?

MR. PRATT: On 34. I stopped at line 23.

THE COURT: Then when did you pick up?

MR. PRATT: I recommenced on page 37 at line 23.

THE COURT: Until?

MR. PRATT: Through line 4 on page 38.

THE COURT: Okay. All right. Now next deposition.

MR. PRATT: Is Alfred J. Marks, taken on September 18, 1969.

MR. MC GRATH: May we approach on this, your Honor.

THE COURT: Okay.

(At the bench.)

MR. MC GRATH: I object to the reading of the deposition of Alfred J. Marks since Mr. Marks is now deceased and prior to his death while there was a period of time while the deposition could have been offered to Mr. Marks for his review and correction and execution, it was not done, and reading from the unexecuted copy of the deposition is objected to.

THE COURT: Wasn't it ever submitted for his signature?

MR. WENTZEL: When we got the case none of the depositions had yet been signed and when we got them we tendered them all.

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THE COURT: When did you get the case?

MR. WENTZEL: In 1970.

MR. MC GRATH: I don't know the exact date but my recollection is he died in 1970.

MR. WENTZEL: The beginning or end of the year?

MR. MC GRATH: The end of the year. I think it was a year after this deposition.

THE COURT: What is the rule about the execution of depositions? Have you looked at that?

MR. MC GRATH: Yes, I have. It is governed by the state rules, your Honor.

THE COURT: No, have you looked at Rule 30-C, or Rule 30-E?

MR. MC GRATH: Yes, your Honor. I did, your Honor. I also looked at another rule of evidence.

THE COURT: When was the death of Mr. Alfred Marks?

MR. MC GRATH: In the winter of 1970. I will get you the exact date.

THE COURT: Mr. Wentzel, the rule really assumes that the deposition -- I don't know whether it does or not. I suppose that there are two people who can request the opportunity to correct and sign. One would be Mr. Marks and one would be you. Now neither one did it. So are we going to bar the deposition?

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I assume Mr. Marks -- I assume defense counsel got copies of these transcripts right away and if there were any corrections to be made, they could have been.

MR. MC GRATH: I have no knowledge of that. I came into the case in 1974. At that time Mr. Marks was represented by Mr. Coffee. I was told by Mr. Coffee and parenthetically Mr. Wentzel was not in the case at the time of this deposition either.

I think you came in the following year, 1970, didn't you?

MR. WENTZEL: I didn't take this deposition.

MR. MC GRATH: This deposition was taken in 1969. My point is, Judge, that even before Mr. Marks died there certainly was an adequate period of time that it could have been submitted to him.

THE COURT: Or he could have requested a correction.

MR. MC GRATH: I don't think the onus is on the declarant to do that.

THE COURT: I don't know. I think really with a deceased party to prevent the reading of the deposition is a very serious matter, and I think that he cannot sign it now, he couldn't sign it when it was submitted to him because he had died.

The question is whose responsibility was it to let

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it go until he had died and I think it's a case of mutual responsibility. If there were corrections that he wanted to make, defense counsel, he was representing in this action, and he could have corrected it.

MR. WENTZEL: Is there any claim that there is anything incorrect?

THE COURT: That's right.

MR. MC GRATH: I have no way of knowing whether or not this was accurate, but I think the onus is upon the person who offers it in evidence.

THE COURT: I don't accept that. I don't accept that at all. I think that he was represented by counsel at the deposition. He had an opportunity to get the transcript. I presume he got a copy.

MR. WENTZEL: Yes.

MR. MC GRATH: Then I would ask for a showing when was a copy of the transcript sent to Mr. Marks.

THE COURT: You are his counsel.

MR. MC GRATH: Judge, I have absolutely no correspondence on this.

THE COURT: Was there a copy of this deposition in your file?

MR. MC GRATH: Yes, when he died in 1973.

THE COURT: I presume it was rendered within due course.

MR. MC GRATH: I beg to differ, your Honor.

THE COURT: Borak is a reputable service. They wouldn't have waited two years.

MR. MC GRATH: It came from the attorneys.

THE COURT: The presumption is that he got it in due course.

MR. MC GRATH: I am going to ask for a showing on that.

THE COURT: I will permit the reading.

MR. MC GRATH: Can we have a direction that they produce a letter. For instance if they didn't send it to Mr. Coffee until after the party died, then it would certainly be clear that he had no opportunity.

THE COURT: Then Mr. Coffee could have asked for it. Mr. Coffee had a little responsibility here.

MR. WENTZEL: My understanding --

THE COURT: Let's shorten this. Get going with the reading of it.

(In open court.)

MR. MC GRATH: Note my objection, please, to the reading. Note my objection to any reading from this document at this time.

THE COURT: All right.

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MR. MC GRATH: In the absence of a showing that the transcript was timely sent to attorneys for my client.

THE COURT: All right, Mr. Pratt.

MR. PRATT: This is the deposition of Alfred J. Marks taken on September 18, 1969. The questions are by Mr. Geller beginning on page 31 at line 21.

"Q As managing director --"

THE COURT: Okay. Now I don't know whether we told the jury, but this is another defendant who died and his deposition was taken September 18, 1969. The date of his death was sometime in the winter of 1970. All right.

MR. PRATT: And I think this question refers to LOMTO as managing director. The prior materials refers to LOMTO.

"Q What were your main functions?

"A To run the business of the organization.

"Q Did you also act as a spokesman for it?"

THE COURT: I'm not sure we -- we have had several references to LOMTO but can someone state -- I don't imagine there is any dispute -- what is LOMTO or what was LOMTO?

MR. MC GRATH: The League of Mutual Taxi Owners, an owner driver organizations.

THE COURT: And did it have any connection with any defendant in this -- I mean connection -- was it a part

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of ITOC?

MR. MC GRATH: It became a part of ITOC at various times.

THE COURT: All right.

MR. PRATT:

"Q Did you also act as a spokesman for it?

"A Yes, I did.

"Q Did you as such spokesman give publicity to the views and policies of the organization?

"A Yes, I did. Of course, most of it with the approval of the board of directors.

"Q Did you receive any orders from anyone apart from the board of directors?

"A No.

"Q Were you the chief executive operating officer of the organization?

"A Yes.

"Q Did LOMTO become a participating organization in ITOC when it was organized?

"A Yes.

"Q And what position did you thereafter, if any, hold in ITOC?

"A I think I was the president at the time.

"Q In 1964?

"Marks

"A I don't remember the date but the day we started.

"Q And for how long did you continue to be president?

"A For most of the year until last year when I gave it up. I became the president again.

"Q Was the LOMTO composed just of other organizations?

"A No. LOMTO was only the --

"Q I'm sorry. ITOC -- was it just composed of other organizations like LOMTO?

"A Yes.

"Q And how many organizations was it composed of when you started?

"A Five.

"Q And what were those?

"A UTOG, you want the --

"Q The abbreviations are good enough.

"A UTOG, Broad Street, Amalgamated and ITOA, and LOMTO.

"Q Did they remain the same until the present date?

"A No. UTOG pulled out.

"Q Did it ever --

"A No. In '64, that's when they came in, and they pulled out again, and then came back in again, but we remained in ITOC."

Then turning to page 37 --

"Marks

MR. MC GRATH: Excuse me, your Honor.

"Q Do you remember when UTOG pulled out, during what period of years?

"A I would say four or five years ago."

THE COURT: Okay.

MR. PRATT: Starting on page 37, at line 11.

"Q How often did the representatives of the various organizations who were members of ITOC meet?

"A Before we became ITOC we used to meet once a week to try to discuss problems.

"Q And after?

"A No definite meeting dates. Whenever something of importance came up, we called a meeting.

"Q Were minutes kept of those meetings?

"A Yes."

Turning to page 39, line 13.

"Q Did you, from time to time, after you became the managing director of LOMTO, meet with leaders or officials or representatives of the Metropolitan Taxicab Board of Trade?

"A Yes.

"Q And did that occur fairly regularly during the years?

"A No.

"Marks

"Q Did it occur fairly regularly during the periods of time when there were major issues that were affecting the taxi industry, such as the fare increase, and the union organizing?

"A I would say no more frequent than maybe once every couple of months until, maybe every day for a few days until something was concluded. Certainly not with the board of directors. This would have been the leaders, Henry Friedlander or Botwinick."

Now turning to page 43.

MR. MC GRATH: Excuse me. Page 38.

"Q Did you during the period after you became managing director of LOMTO attend meetings of the Metropolitan Taxi Board of Trade? I don't mean regularly, but at any time from time to time.

"A As I said before, the one time I remember specifically is when we wanted a fare increase. And there may have been something of importance to the industry on it. I don't recall. But no more than one or two times.

"Q Do you remember when that meeting was that related to the fare increase?

"A It wasn't the fare increase. It was the elimination of the ten-cent taxi tax."

MR. PRATT: Beginning on page 43 at line 2.

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"Q Do you recall the City Council meeting in June 1964 relating to the taxi fare increase?

"A I --

"Q Do you remember a major meeting before the City Council on the subject of what became the ten-cent fare increase?"

MR. MC GRATH: Before you go there, excuse me. Page 40.

"Q Wasn't there a period of time -- and I am now narrowing it down to the years '64, '65 and '66 -- when the leading people among the fleet owners met somewhat regularly with the league representatives of the owner drivers to discuss mutual problems?

"A Not that I recall. Because if they ever met, it would be with me, and no one else.

"Q I mean, more than just yourself, a few people who represented the owner drivers.

"A Yes, of course. If they invited me, they would invite the other heads of the organization.

"Q Weren't there somewhat regularized meetings?

"A No.

"Q Between the two groups.

"A No. They tried to but it never turned out. It never materialized. They never had a second meeting. One meeting they said let's meet regularly once a month."

And again on page 42, line 10.

"Q Was there a point in time when the fleet owners and the owner drivers worked out common strategy on the fare increase?

"A I think that only applies --"

I will read it over. Page 42, line 10.

"Q Was there a point in time when the fleet owners and the owner drivers worked out a common strategy on the fare increase?

"A I think that only applies to that, to this first one. It never applied after that. Because we weren't involved with them in the fare increase.

"Q Well --

"A We were out on our own, and we wanted nothing to do with the fleet operators at that time.

"Q Weren't you involved with them in '64 when the ten-cent fare increase was coming into discussion?

"A No. I think we did that on our own.

"Q Do you recall?

"A As a matter of fact, I think UTOG was out at that time."

We are at 43, your Honor.

THE COURT: Okay.

MR. PRATT: This is 43, line 2.

"Q Do you recall the City Council meeting in June 1964 relating to the taxi fare increase?

"A I --

"Q Do you remember a major meeting before the City Council on the subject of what became the ten-cent fare increase?

"A Not with the fleet owners. Is that what you are trying to say?

"Q I'm talking about an actual session of the City Council before which various representatives of the fleet owners and the owner drivers came to talk about the fare increase.

"A Not the fleet owners. The truth of the matter is, I think, and this is only -- I am trying to recall -- I think we met with Morris Marken the night before and he certainly had no love for the fleet operator at that time.

"Q And the fleet operators had no love for Morris Marken; is that correct?

"A Yes."

Continuing the answer.

"A And the truth of the matter is that Morris Marken was our spokesman at that City Council hearing. He had his attorney speaking in our behalf.

eblm 28 "Marks

"Q Before that time --"

And continuing the question.

"Q Before that time, however, didn't the fleet owners and the owner drivers get together at some point to try to work out a common strategy?

"A Yes, but I don't think we did. I don't think we ever came together on the structure itself. This is why we went out on our own and I can show you some back issues where we disassociated ourselves from the fleet operators right in front.

"Q But before you did that there was a time when you tried to work out a common strategy?

"A I would say so. I would work it out with Les Peterman if it did me some good.

"Q But you did?

"A I would try to work -- it would be logical and normal.

"Q I am asking you, did you actually try to work with and did you actually meet with taxi fleet owners and representatives concerning the fare increase?

"A Yes.

"Q Who did you meet with?

"A I would say Ben Botwinick and Henry Friedlander."

Now continuing on page 46 at line 4.

eblm 29 "Marks

MR. MC GRATH: Excuse me. Continuing on after Mr. Pratt stopped. Line 5, page 45.

"Q Did you also meet with George Friedlander?

"A Not to my knowledge.

"Q Did you meet with Jack Plotsky?

"A Not until later, no. I would say no.

"Q At any of these meetings on the fare increase did you discuss Taxi Weekly or Les Peterman or their position on the fare increase?

"A I would say no, to the best of my recollection.

"Q What was your position or what was ITOC's position and LOMTO's position on the fare increase?

"A Well, we were in favor of a fare increase.

"Q And were you in favor of the larger increase than even ten cents?

"A Yes, we were."

THE COURT: Okay. Where do we go now?

MR. PRATT: Page 46, line 4.

"Q Was ITOC a subscriber to Taxi Weekly in 1964?

"A No.

"Q At any time.

"A No.

"Q How about LOMTO?

"A Yes.

eblm 30 "Marks

"Q And when was LOMTO a subscriber?

"A All the years that I have been there.

"Q Was there a time when the subscription was canceled?"

MR. MC GRATH: I object to that.

MR. PRATT:

"A Yes."

MR. MC GRATH: I object to that question at this time, your Honor, because it is not placed in time and you will see from the following reading that it never was.

THE COURT: I will overrule that objection. Go ahead.

MR. PRATT:

"Q What was that?

"A I cannot give you the exact date but I can tell you the incident.

"Q Was it in 1964?

"A I can tell you the incident. I don't remember the date.

"Q Just tell me the incident though. I don't care about the date now.

"A We canceled our subscription when the editor and publisher of Taxi Weekly came to one of our joint sessions and insisted that we supply every one of our members with

eblm 31 "Marks

a paid copy of Taxi Weekly and I refused, of course.

"Q Who was the editor and publisher?

"A Les Peterman.

"Q At that time was there another co-editor or co-publisher?

"A It was Abe Wysinger.

"Q Before that time had you not bought a copy for each member of LOMTO?

"A No. I bought bulk copies but the truth of the matter is, for many years, and up until that point, I used to try to get my members to subscribe and I sold subscriptions for him up until that day, you know, individual subscriptions.

"Q And it was after that date that you canceled?

"A Yes."

Page 49 --

MR. MC GRATH: Continue on.

"Q You don't recall what date that was?

"A No.

"Q Who was present at the time this incident occurred?

"A I think the four or five heads of the groups. We hadn't formed an association then.

"Q When you were talking about the group that was present, was that the ITOC group?

"A Yes.

"Q But you acted just for LOMTO?

"A Yes.

"Q Was there a common decision at the time?

"A No. It had nothing to do with anyone else.

"Q Did he speak to you personally?

"A No. He wanted all the ITOC members to join up, and he wanted LOMTO to increase their dues, and in this increase of dues give each one of the members a copy of the Taxi --

"Q Did the other groups at that time subscribe?

"A No, it only applied to me.

"Q Is LOMTO the biggest group?

"A Yes, it is.

"Q Just in round numbers, how many members did LOMTO have at the time?

"A I would say about 1400 at that time.

"Q How about the other four?

"A I can't talk for them. This is secret. No one tells what their membership is or what the amounts are. Each one claims to be the largest."

Are you going to read from 49, sir?

MR. PRATT: I am not.

THE COURT: Well, I hope we finish this before the break, but let's take a break now and go back to this.

MR. WENTZEL: Your Honor, may we see you for five minutes at some point during the break.

THE COURT: Yes. I will let you know later. I want to see my secretary for a minute.

(Recess.)

THE COURT: Okay. We have some more reading from the deposition.

MR. PRATT: Continuing on page 50 of the deposition of --

MR. MC GRATH: Excuse me. Did you finish reading on 49?

MR. PRATT: That's right.

MR. MC GRATH: Page 49, line 6.

"Q When Mr. Peterman spoke to you, you say it was a demand. Did he demand it or did he ask you to do it?

"A He demanded it. I would go a step further if you want me to.

"Q If there is anything that you have to add that would give me the details of the meeting, yes, if you would.

"A When I said no, I couldn't, because we couldn't increase the dues, he said, if you don't, I will go to the membership directly myself, and he almost implied that he would say things that are detrimental to us.

eblm 34 "Marks

"Q Well, did he say more than that, that he would go to the membership itself?

"A No, but he kept on in this vein for some time."

MR. PRATT: Judge, I move to strike the reference to the fact that he almost implied.

THE COURT: No. I think it's relevant to the state of mind of Mr. Marks if nothing else, so I will overrule the objection.

MR. MC GRATH:

"Q Do you recall whether this was a relationship to the discussions on the fare increase? I don't mean the date.

"A No, I couldn't.

"Q Did you cancel by letter or did you right then and there on the spot orally cancel it?

"A No. It must have been --

"Q A period of time after that?

"A Yes.

"Q You don't recall if you did it by letter?

"A By letter, because I got a bill for a few. I must have sent him a letter on it."

Down to the bottom of page 50, line 22.

MR. PRATT: I will read 22.

"Q Were you familiar with, or did you know about the existence of a newspaper called The Hackman?

"A Yes.

"Q Was LOMTO a subscriber to that?

"A No.

"Q At no time?

"A At no time.

"Q Did you know the circumstances under which The Hackman came to be published?

"A Well, I can't talk about --

"Q What was the information that you received?

"A When they -- when the operators also disassociated themselves from the Taxi Weekly, they wanted a publication to get their message across to the membership, and they put out -- they had McIntyre put out The Hackman for them."

Now continuing on page 52. At line 19.

MR. MC GRATH: Excuse me. Page 51, the bottom of that page, line 18.

"Q Did you know Al Zeff?

"A Yes, I did.

"Q Did he also participate in the paper with McIntyre?

"A Yes, I think he was a partner. But of course we wouldn't subscribe because we had a competitive paper.

"Q What paper was that?

"A ITOC newspaper.

"Q Didn't that start publication after?

"Marks

"A Much before The Hackman.

"Q Didn't the ITOC News really put out one or two copies while The Hackman was being published and ceased publication and then didn't Al Zeff take over The Hackman ITO --

"A You lost me after while the.

"Q While The Hackman was being published did ITOC News publish more than one or two issues?

"A I would say yes, although we didn't publish periodically. We didn't let's say every month, Monday, whenever I got around to it."

THE COURT: Just a second. Where were you, Mr. McGrath?

MR. MC GRATH: I just read an answer of the deceased, Mr. Marks. Page 52, now line 19.

"Q But you considered The Hackman a fleet newspaper basically?

"A Yes, I would say so, of course.

"Q Do you know why The Hackman ceased publication?

"A No.

"Q Do you have any information on that?

"A No.

"Q What was the reason to your knowledge or information that the fleet owners dropped Taxi Weekly as a newspaper?

"A I don't know.

"Q Did you talk with any fleet owners on that subject?

"A No. This wasn't my business. I had enough of my own problems."

MR. PRATT: I am now going to page 67, line 7.

MR. MC GRATH: Page 54, line 19 through 21.

"Q Did you speak to any advertisers of advertising or limiting their advertising in Taxi Weekly?

"A Certainly not."

MR. PRATT: I am starting on 67, line 7.

"Q Mr. Marks, I show you this copy of a newspaper article which appears just for identification in the plaintiff's verified Answers to Interrogatories in this action, dated November 23, 1966. It is page 4 of Schedule 6. I'm sorry, it's page 5, the fifth page. It's Schedule 7 of those interrogatories. I ask you is this a copy of the newspaper article which you caused to be published under your name in the ITOC News?

"A Yes.

"Q And did you prepare that article?

"A I would say that this was prepared by most of the executives on the ITOC committee.

"Q But it went out under your signature?

"A Absolutely."

MR. MC GRATH: Excuse me. Your Honor, the date of this is November 23rd, 1966. It was my understanding that the alleged --

THE COURT: Just one second.

MR. PRATT: The date of the interrogatories.

MR. MC GRATH: I'm sorry.

THE COURT: Can you just tell me, before we read it, because there apparently is an objection, what does this lead into, the testimony at the bottom of 68?

(Discussion off the record.)

THE COURT: Really this is meaningless. I just want to avoid another conference. I will sustain the objection. It's too late in time.

MR. PRATT: That's all that we have from the deposition of Al Marks.

MR. MC GRATH: Page 62.

"Q What was your organization's position? I am referring to the ITOC and LOMTO and the union organizing drive.

"A I am opposed to the union for the owner driver.

"Q That wasn't quite what I asked but it will do. I will take everything I can get. Was your answer that the organizations as well as you were opposed to the union with respect to the owner drivers?

eblm 39 "Marks

"A I am only talking to LOMTO.

"Q Was there a different position in ITOC?

"A Yes. One of the member organizations had a different opinion.

"Q Which organization?

"A UTOG.

"Q In favor of the union?

"A For owner drivers, and that's why they left the ITOC."

Thank you, your Honor.

THE COURT: All right, is there another deposition?

MR. DINKES: In view of the fact it's going to be lunch time in a half hour, maybe we could get Mr. Kobak on so he could leave before lunch because we asked him -- I would like to develop the questions that he was going to answer before.

THE COURT: I'm not sure he can leave at lunch, so let's keep on going.

MR. PRATT: The next deposition is of Mr. Abraham Wysinger, your Honor.

THE COURT: I guess I don't have that.

MR. DINKES: Mr. Wysinger is not a party to this lawsuit. Can we have the authority for this?

MR. PRATT: Mr. Wysinger is one, at the time of the deposition he was at least 72. The deposition was taken and he resides to my knowledge or understanding in Montauk, which is in excess of a hundred miles.

THE COURT: Is it over a hundred miles to Montauk?

MR. WENTZEL: Yes, it is, your Honor. I drove it that day myself.

MR. DINKES: I would just like to state that where Mr. Wysinger lived at the time of the deposition is not relevant to the admissibility at the time of trial. What is admissible is where -- if he is unavailable at the time of trial, then his testimony might be able to be read, and I haven't heard any testimony here about his residence or where he is now.

MR. WENTZEL: At the time I took his deposition in 1970 I noticed it for the courthouse out there in Riverhead, and he furnished a doctor's statement that he was ill, he was 78 years old at that time, had a heart condition, couldn't leave his own home, so we took the deposition in his home.

THE COURT: What is the current information about where he resides?

MR. WENTZEL: As far as I know, he still resides out there in Montauk. I am not sure he is still alive.

MR. DINKES: I don't think that's proper, what

Mr. Wentzel knows.

THE COURT: Who is checking on the whereabouts of potential witnesses but attorneys. Now you all ought to know where Abe Wysinger lives right now, and I will take the representation of the person who -- what is the last time you checked?

MR. WENTZEL: I haven't checked recently, your Honor.

THE COURT: Well, if he has moved back to Manhattan and is subject to subpoena, that's a different matter. I think somebody probably better try to check on that. Where is Mr. Nessen?

MR. TURCHIN: I don't think he knows his address either.

THE COURT: Can you do something else and have somebody go out and check his whereabouts?

MR. PRATT: We are next going to read the deposition of Alfred Zeff.

THE COURT: September 4, 1969?

MR. PRATT: That's right, your Honor. The questions are by Mr. Geller. Beginning on page 4, at line 9.

"Q Mr. Zeff, when did you start to work for Taxi Weekly?

eblm 42 "Zeff

"A I believe it was in 1954."

On page 5 at line 4.

"Q When you started the Taxi Weekly, Mr. Zeff, what was your position there, and what were your duties?

"A I was an associate assistant editor, editorial assistant. My duties were to write news stories for the newspaper."

On page 10 at line 23.

"Q Did you know George McIntyre while you were working for Taxi Weekly?

"A Yes.

"Q What did you know him as? What was his position as you knew it during those years when you were working for Taxi Weekly?

"A His position, as I knew it, was a public relations man.

"Q Was he the public relations man for the Metropolitan Taxicab Board of Trade?

"A One of his clients was the Metropolitan Taxicab Board of Trade, as I understood it.

"Q During the years that you were with Taxi Weekly was there any other public relations man or company working for the Metropolitan Taxicab Board of Trade as far as you know?

eblm 43 "Zeff

"A There may have been as far as I know. I'm not sure. I could not answer that with any degree of certainty whether there was anybody else or not.

"Q Was Mr McIntyre the only public relations man from the Metropolitan Taxicab Board of Trade that you dealt with?

"A Not that I believe.

"Q When you say not that you believe, do you know of any others that you actually dealt with? I am not asking whether there were any others.

"A There were no others who announced themselves as public relations men from the Metropolitan Taxicab Board of Trade.

"Q Whether they announced or not, did you have any knowledge, information or belief?"

THE COURT: This is just a waste of time. We don't know of any other public relations men. Do you?

MR. MC GRATH: None that are relevant, Judge.

THE COURT: All right, let's skip this.

MR. PRATT: Line 16, I think this is a different point.

"Q Now, when was your -- what did you have to do with Mr. McIntyre in those years that you were serving as an associate editor for Taxi Weekly in a business way?

ebla 44 "Zeff

"A In a business way, check with him on any information concerning his client that might be of interest for our newspaper.

"Q When you say his client, to whom are you referring?

"A The Metropolitan Taxicab Board of Trade.

"Q Was he a source of news then for you?

"A Yes.

"Q Was he one of your main sources of news?

"A Yes."

Turning to page 14 at line 19.

"Q While acting as a source of news for you while you were with --"

THE COURT: What page are you on?

MR. PRATT: Page 14, line 19.

"Q While acting as a source of news for you while you were with Taxi Weekly did Mr. McIntyre from time to time give you news releases that he had prepared for insertion in Taxi Weekly?

"A I would imagine so.

"Q When you say you would imagine, do you know that to be a fact?

"A I would say probably yes. Since this was the common practice for most public relations people to do.

"Q You only say probably. Do you know that as a

eblm 45 "Zeff

fact he did so on any occasion? Do you recall that he did?

"A I recall that he did, to the best of my knowledge, yes.

"Q Did he also, from time to time, give you editorials or editorial comment that he wished to have inserted in Taxi Weekly?

"A No.

"Q Did any other representative of the Metropolitan Taxicab Board of Trade do so?

"A Give me editorials or editorial comments?

"Q Yes.

"A No."

Turning to page 16.

MR. MC GRATH: Just one question.

"Q To your knowledge or information, did Mr. McIntyre or any representative of the Metropolitan give editorials to Mr. Wysinger for insertion?

"A I would not know."

THE COURT: Okay. Then what's next?

MR. PRATT: Page 16, line 4.

"Q Did you, from time to time, have discussions with Mr. McIntyre on subjects that thereafter were the subject of editorials or editorial comments by you?

"A Yes.

eblm 46 "Zeff

"Q Did you get from his -- his views and thoughts of the Metropolitan Taxicab Board of Trade on those subjects?

"A I received from him his views. Whether they were the views of anybody else I couldn't say. All I knew was that they came from him.

"Q Were you interested in Mr. McIntyre's views as an individual apart from his position as a public relations man for the Metropolitan?

"A Mr. McIntyre was a member of the industry who was representing people in the industry and I spoke with him and got his views. Whose views they represented I don't know.

"Q Did you not know that they were the views of the Metropolitan Taxicab Board of Trade?"

And then -- the question is repeated.

"Q Did you not know that the views of Mr. McIntyre expressed to you were the views of the Metropolitan Taxicab Board of Trade?

"A If Mr. McIntyre expressed views that he said were the views of the Metropolitan Taxicab Board of Trade, that is what I believe.

"Q Did you not also take his views to be the views of the Metropolitan? Isn't that why you published them in the newspaper?

"A Not always, no.

eblm 47 "Zeff

"Q Did you ever publish Mr. McIntyre's views [illegible] his individually?

"A I can't remember. I can't remember. You are talking about a period that covers a number of years. I can't remember them all."

THE COURT: There is something about this questioning that is awfully repetitious. Can you skip over to some other point.

MR. PRATT: The next item is on page 5 at line 22.

THE COURT: Okay.

MR. PRATT:

"Q I am interested in the Metropolitan. Who did you speak to who appeared to be or said he was a representative of Metropolitan and spoke for Metropolitan other than McIntyre?

"A Well, on occasion, Henry Friedlander and Ben Botwinick.

"Q Were there any others?

"A Not to my recollection.

"Q Did you also speak with them and get -- cross that out. Did you ever receive from Mr. Friedlander and from Mr. Botwinick the viewpoints of Metropolitan on subjects on which you subsequently wrote editorials for Taxi Weekly?

"A Yes.

"Zeff

"Q Now, did you, from time to time, incorporate or adopt in editorials you wrote for Taxi Weekly the viewpoints for Metropolitan expressed by Mr. McIntyre, Mr. Botwinick or Mr. Friedlander?

"A Yes."

Turning to page 38.

MR. MC GRATH: Page 28. Let's go back to the bottom of 27 so we have the context, line 19.

"Q Are you saying when Mr. Peterman told you not to put in a certain editorial comment, you would not put it in?

"A Usually. That depends on the particular situation. It depended on a particular situation.

"Q Let's go to one particular situation. In or about June of 1964 did you not have inserted in the newspaper an editorial relating to the fare increase that Mr. Peterman instructed you shouldn't be inserted?

"A I do not remember what the editorial related to at the time. I do remember that Mr. Peterman instructed me not to put it in.

"Q What happened thereafter?

"A Mr. Wysinger instructed me to put it in.

"Q Do I have the date correct as far as you can recall about June 1964?

"A I'm not sure of the date. It sounds right but I'm not sure.

"Q Was there a dispute at that time between Mr. Peterman and Mr. Wysinger on general matters affecting Taxi Weekly?"

THE COURT: 29, line 4.

MR. MC GRATH:

"A It was my belief at that time that there was a dispute between Mr. Wysinger and Mr. Peterman on a number of matters.

"Q Did you originally write that editorial on the fare increase or did Mr. Wysinger write it?

"A I'm not sure as to that particular editorial. I know that throughout my time at Taxi Weekly on many occasions Mr. Wysinger, who was not a writer, spoke to me about editorials, gave me his thinking. I then wrote them and checked them with him. I would presume that the same situation occurred at that time."

Thank you.

MR. PRATT: Page 38, line 11.

"Q Do you recall the month in which you left Taxi Weekly?

"A To the best of my recollection, it was either August or September. I'm not sure. I think it was --

"Q The year was 1964?

eblm 50 "Zeff

"A 1964.

"Q Did you resign?

"A Yes.

"Q What was the reason that you resigned?

"A Well, the prior circumstances in which I had been supporting Mr. Wysinger and disputing Mr. Peterman, I felt that I could not continue to work for Mr. Peterman as the sole owner of Taxi Weekly.

"Q Did you give any notice that you were resigning?

"A No. I resigned effective immediately. I then, as I was clearing my desk out, felt that I may have been not precipitous but I may not have been fair to Mr. Peterman and I then offered to stay on for an indefinite period. I don't remember whether it was a week or a few days, until he could find somebody else. Actually, I called him from downstairs to offer this and he rejected my offer.

"Q Had he, at any time --

"A In that second I felt I was doing him dirt, just as a person.

"Q Did he at any time, prior to that, ask you to resign?

"A Not that I remember.

"Q On the day that you resigned did you ask the girl in charge of the subscription lists of Taxi Weekly to prepare a master list for you?

"A I don't remember.

"Q Do you remember the girl's name?

"A Bea Krasner.

"Q At any time before that during the week had you asked Miss Krasner for the subscription list?

"A Yes.

"Q Was that for the purpose of taking the list with you elsewhere?

"A It was with the thought that if I may want to start a newspaper of my own, I may want to have a subscription list to circulate for subscribers to a new publication.

"Q Had you asked Mr. Peterman's permission to obtain that list?

"A No.

"Q When you left Taxi Weekly did you have any plans for starting a new newspaper?

"A I had thought about it.

"Q You did thereafter start a new newspaper?

"A Yes.

"Q Was that The Hackman?

"A The New York Hackman; that's correct.

"Q When did you start that? When was the first issue of The Hackman published?

eblm 52 "Zeff

"A I believe it was in November of that year. I'm not sure as to the exact date.

"Q The owner of The Hackman was Hosynd Publications, Inc.?

"A Right."

Page 41, line 23.

"Q How long before? Do we have a date as far as your best recollection now, when the first issue was published? How long before was Hosynd Publications, Inc. incorporated?

"A I would have to check that and supply the information to you. I can't remember at this date.

"Q Who was the attorney who did the work for incorporation?

"A Edward Kasoff, I believe.

"Q Had he been your attorney before that time?

"A No, he had not been my attorney before that time.

"Q By whom was he recommended?

"A Mr. McIntyre.

"Q Was he in his own firm?

"A Mr. Kasoff?

"Q Yes.

"A I believe so.

"Q When Hosynd Publications was first organized, who were its stockholders?

"Zeff

"A Mr. McIntyre and myself."

MR. MC GRATH: The next question on that page.

MR. PRATT: I'm going to continue.

"Q Were you equal stockholders?

"A No.

"Q How long before you went to Mr. Kasoff had you and Mr. McIntyre first talked about starting this new corporation?

"A Say a number of days, a couple of weeks or so, somewhere along that. I'm not sure of the exact time.

"Q Did you at that time have in mind that it would publish The Hackman or a newspaper?

"A A newspaper, yes. I don't know whether we had the name picked out at that time or not.

"Q Whose suggestion was it that you go into business with Mr. McIntyre and publish a newspaper?

"A Both of ours.

"Q Who first made it?

"A I don't remember whether it was he or me.

"Q Did Mr. McIntyre tell you that he would get for you the Metropolitan Taxicab Board of Trade and all the taxi fleet owners as subscribers?

"A No.

"Q Did he suggest that he may be able to do that?

eblm 54 "Zeff

"A It was suggested that we could get the taxi fleet operators as our subscribers."

MR. MC GRATH: That's a question, that's not a statement.

THE COURT: It's got a question mark on it but it's probably a typo.

MR. MC GRATH: It could also be that he was asking a question.

THE COURT: I don't know. I will tell the jury that there is a question mark there. Let's go on.

MR. PRATT: Page 44, beginning at line 23.

"Q At the time that Hosynd was incorporated, to your knowledge --"

MR. MC GRATH: Excuse me.

"Q What was the initial investment in The Hackman in Hosynd?

"A Of mine?

"Q Well, the total initial investment.

"A I think it was somewhere in the neighborhood of $5,000.

"Q And of that amount, what did you put up and what did Mr. McIntyre put up?

"A To the best of my memory, I put up 48 percent and he put up 52 percent.

"Zeff

"Q Did you put up the money from your own resources or did you borrow it?

"A From my own resources.

"Q Were you given any money in connection with The Hackman by Mr. McIntyre?

"A No.

"Q Directly or indirectly.

"A No.

"Q Were you given any money by the Metropolitan Taxicab Board of Trade?

"A No."

You can go ahead, sir.

MR. PRATT: Page 44, line 23.

"Q At the time that Hosynd was incorporated, to your knowledge, was Mr. McIntyre still the public relations man for the Metropolitan Taxicab Board of Trade?

"A To my knowledge, yes."

Page 46, line 4.

"Q Who, to the best of your recollection, were the directors of Hosynd?

"A To the best of my recollection, Mr. McIntyre, his wife and myself.

"Q Was there a time when Mr. McIntyre became the president?

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"A I believe so. Later on.

"Q Was it disclosed publicly that Mr. McIntyre was associated with The Hackman when The Hackman was first published?

"A No.

"Q I show you this issue of The Hackman dated April 7, 1966 and ask you was this the first public disclosure of the fact that Mr. McIntyre was associated with The Hackman?

"A Yes."

Turning to page 49 at line 19.

"Q Incidentally, when did The Hackman cease publication?

"A I don't remember the exact date.

"Q What year was that?

"A 1966, I believe.

"Q What month in the year?

"A I am not sure. I think it may have been May. I'm not sure.

"Q Is this the last issue of The Hackman, what I'm showing you?

"A Yes."

May I read the comment of Mr. Geller which dates that issue?

THE COURT: Yes. May 19, 1966.

MR. PRATT: Turning to page 59, line 11.

"Q What were the circumstances under which The Hackman ceased publication?

"A Well, at the time that we ceased publication, I felt that there was no future in the publication any more for me. I felt that I would do better by starting a publication specifically for the owner drivers.

"Q Had The Hackman operated as a profit at any time?

"A Yes. The Hackman -- well, a profit. I was paid a salary and I earned a living wage, but I felt that I wanted a publication that I was the boss of, the owner of, and I felt that there was more of a future for me with the owner drivers.

"Q Weren't you a co-owner of The Hackman?

"A Minority owner."

Turning to page 70.

MR. MC GRATH: In fairness, page 60 at the top.

"Q Did Mr. McIntyre receive any money from The Hackman? You say you received a salary.

"A No, he was not on salary.

"Q Did he receive any income, any dividend from The Hackman?

"A When we finally ceased publication of The Hackman, and ended the partnership, he received whatever was in there according to our partnership, according to our broken arrangement.

"Q That was merely a return of investment?

"A That's correct.

"Q Did he receive anything more than a return of investment?

"A No."

MR. PRATT: Turning to page 70, line 4. Let me go back and read for continuity a question on page 69 at line 20.

"Q Can we have your agreement that you will give us the ITOC circulation figures, the general circulation figures?

"A I will give them to you right now."

Then skipping to line 4 on page 70.

"A ITOC's circulation figures on the average 4,400; ITOC new circulation figures on the average 4,400 per issue.

"Q What were the average circulation figures with The Hackman?

"A I don't remember.

"Q But it was more than 4,400?

"A More than 4,400.

"Q Has that been true of the ITOC News from its inception to date?

"A The figures?

"Q Yes.

"A Yes, I say it's an average figure since it started.

"Q Since the circulation was less, what were the greater opportunities that were afforded by the publication of the ITOC News as opposed to The Hackman?

"A Sizable increase in advertising revenue.

"Q What was the reason for the increase in the advertising revenue?

"A For the much wider circulation among owner drivers, more business firms dealing with owner drivers were then willing to advertise."

Turning to page 75 at line 9.

"Q Who was Morris Marken?

"A To my knowledge he is the president of Checker Cab Manufacturing Company of Kalamazoo, Michigan.

"Q What was his position generally speaking in the taxicab industry during the period of time that you were connected with the successive newspapers, that is, Taxi Weekly, The Hackman and ITOC News?

"A In the years which I started in the industry, he was a man who in my knowledge was president of a company which manufactured taxicabs. He was also a man who owned in various cities throughout the company a number of taxicab fleets.

"Q Was he not the proponent of the purpose-built cab as opposed to the stock car cab?

"A He builds a purpose cab.

"Q Was he not a vigorous proponent of that type of cab?

"A Of course. He wanted to sell them.

"Q Did he not become and remain a controversial figure in the taxicab industry in New York because --

"A You are asking my opinion?

"Q Yes. You are a reporter. Was he not a controversial figure in the taxicab industry in New York because of his espousal of the purpose-built cab?

"A In my opinion, yes, he was a controversial figure.

"Q And were there not a substantial number of fleet owners and owner drivers who were hostile to him in a business way at least if not personally because he was opposing the purpose-built cab?

"A In my years as a reporter in the industry there were expressed to me by a number of fleet operators, by a number of individual owners and still to this day people who say they oppose Morris Marken's business viewpoint."

Then on page 87, line 5.

eblm 61 "Zeff

"Q Did you have any other employment while you were putting out The Hackman?

"A No."

And that's all that we have in Mr. Zeff's deposition.

THE COURT: What else?

MR. WENTZEL: Your Honor, we have a number of documents on which we have agreement.

THE COURT: Good.

MR. WENTZEL: I believe. Plaintiffs' Exhibit 24, your Honor. Do you want me to identify these to you?

THE COURT: No. I just want to know if there are any objections. If not, I will receive them.

MR. NESSEN: None of these except 38 and 50.

THE COURT: Then just read all of the numbers.

MR. WENTZEL: Plaintiffs' Exhibits 28 --

THE COURT: Wait. 24 is received.

xxx (Plaintiffs' Exhibit 24 for identification received in evidence.)

THE COURT: Next.

MR. WENTZEL: 28.

THE COURT: If there is no objection, I will receive it.

xxx (Plaintiffs' Exhibit 28 for identification received in evidence.)

MR. WENTZEL: 29.

THE COURT: Is 29 offered?

MR. WENTZEL: Yes.

THE COURT: 29 is received.

xxx (Plaintiffs' Exhibit 29 for identification received in evidence.)

MR. WENTZEL: 30.

THE COURT: 30 is received.

xxx (Plaintiffs' Exhibit 30 for identification received in evidence.)

MR. WENTZEL: 33.

THE COURT: The defendants will have to let me know what they object to. 33 is received.

xxx (Plaintiffs' Exhibit 33 for identification received in evidence.)

THE COURT: Unless I hear an objection I will receive it.

MR. NESSEN: Yes.

THE COURT: What is the one after 33?

MR. WENTZEL: 34, 35, 40, 42.

THE COURT: 34, 35, 40 and 42 are received.

xxx (Plaintiffs' Exhibits 34, 35, 40 and 42 for identification received in evidence.)

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MR. WENTZEL: 43.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 43 for identification received in evidence.)

MR. WENTZEL: 46.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 46 for identification received in evidence.)

MR. WENTZEL: 47.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 47 for identification received in evidence.)

MR. WENTZEL: 48.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 48 for identification received in evidence.)

MR. WENTZEL: 49.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 49 for identification received in evidence.)

THE COURT: Is that it?

MR. WENTZEL: I also wish to offer Plaintiffs' Exhibits 36 through 39 and 50. I believe the defendants may have some objections to those and we can discuss them.

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THE COURT: Are those objected to?

MR. NESSEN: I object to 38 and 50, and I understand other counsel object to 36 and 37 and 39. One of them will take a little bit of argument, your Honor.

THE COURT: Well, the jury can recess now until 2:15.

(The jury left the courtroom.)

MR. NESSEN: May I address myself to 50, first?

THE COURT: Okay.

MR. NESSEN: Your Honor, that's offered, as I understand it, to prove the inflation and the value of the dollar. That is my understanding. And the only relevancy it could have is that.

The cases and the standard rule in the Anti-Trust rule, and I am reading from ALR, the damages aren't adjusted upward to reflect the reduced value of today's inflation deteriorated dollars to pay for yesterday's lost profits. 16ALR, page 20.

THE COURT: Let me hear from Mr. Wentzel. What's the purpose of Exhibit 50?

MR. WENTZEL: First of all, your Honor, it is a certified copy from the Bureau of Labor Statistics so I don't think there is any problem there.

Secondly, it is offered in support of our request

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to charge the jury that they are entitled to take inflation from 1964 to the present into consideration in arriving at the plaintiffs' damages.

We have cited in our requests to charge a number of cases that have approved such charges to the jury, and the only Anti-Trust cases that I am familiar with that have discussed it and really been talking about situations where you are talking about future profits and this kind of thing and indicating inflation and so forth.

My point is that I really think it's covered by general tort situations and we have got a situation here where there has been tremendous inflation, a ten-year period has gone by and I think it's very relevant.

Your Honor, the rule in this circuit as I understand it is that interest is not allowed to be added to Anti-Trust judgments. Well, it seems to me that in fairness to compensate a plaintiff properly, if you are not going to add interest, you should certainly allow the jury to at least consider and take into account the devaluation of the dollar that has occurred in the ten-year period.

THE COURT: I take it that the testimony about the $250,000 value of the business was based on financial statements as of that time.

MR. WENTZEL: Exactly.

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THE COURT: Those dollars at that time.

MR. WENTZEL: Exactly.

THE COURT: Now, I don't know the law, and I think that if Mr. Wentzel says there are cases which authorize the jury to give a premium to that because of inflation, those cases are there. If Mr. Nessen says otherwise, I don't know. I just have to reserve ruling. If you can give Mr. Mark the cases on that you are relying on, we'll look it up.

MR. WENTZEL: Mine are in my requests to charge. I believe they are right underneath the charge.

MR. NESSEN: Lochman versus Day Glow Color Corp., 429 F 2nd 873 1970, Cert. denied 400 U.S. 1020.

THE COURT: We'll look at it.

MR. NESSEN: I will give you a photostat of the case if you want.

THE COURT: Okay. That's wonderful.

Now what other objections?

MR. NESSEN: I object to 38, if I may. It seems to me that the middle paragraph is unnecessary for the proof, and there is a statement from Katz about which I think has an inflaming sort of character and isn't necessary, and I would think that either one, the whole document not be admitted but in any event the middle paragraph.

THE COURT: I will read it.

What is the relevance of 38?

MR. WENTZEL: Your Honor, the series of three minutes here of ITOC. Mr. Nathan Levine, as Mr. Dinkes has argued already, he was not a member of Metropolitan in 1964 and did not cancel in July of 1964 as other defendants did. He canceled about November. These documents show that he was initially opposed to it, Mr. Levine was initially opposed to the fare increase proposed by the fleets, that he had meetings with people at the ITOC, and that he, as reflected in those minutes, agreed to follow the fleet's position and go along with the fleets.

THE COURT: Where does it show that? Just give me a little guidance. Where does it show that he was originally opposed and then agreed to go along with the fleets?

Mr. Marks informed us that Nat Levine and so forth has announced he will not go along with the commitment which the fleets made to the City Council and so forth. What is the change of position?

MR. WENTZEL: The next one reflects a meeting with the ITOC had with Mr. Levine where they urged him to change that position.

THE COURT: Mr. Katz, this is October 8, Exhibit 38 for identification, Mr. Katz presented our picture to Mr. Levine and urged him at this eleventh hour not to go in opposition to the agreement that was made with the City Council on the fare increase by the fleets.

MR. WENTZEL: Finally, Exhibit 39, this paragraph I am pointing to, shows that he had reconsidered his position.

THE COURT: 39, a minute of October 14, our president reported that Nat Levine of the Bell Transportation Corporation had said after the meeting we had with him he reconsidered his decision and will go along with the fleets on their commitment to the City Council on the rate and fare bill.

I think it's marginal but I think I will admit it. Will there be any objection? I assume that that item in 38, that last phrase in the second paragraph, I don't think that has any relevance.

MR. DINKES: You wouldn't mind listening to me before you admit it, would you, your Honor?

THE COURT: What about that, Mr. Wentzel? Would you agree to cut that last phrase? I don't think it's related to this case.

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MR. DINKES: May I see the document, your Honor.

First of all, if your Honor please, I don't have any idea what these papers are or what they purport to be, or have I heard any foundation laid for the introduction into evidence of this paper. What is it supposed to be?

THE COURT: I thought it was a minute.

MR. DINKES: Where is the evidence that it's a minute. Who can prove it. Mr. Wentzel can't. He isn't a member of the organization.

THE COURT: Just take it easy. We have got to deal with this.

MR. DINKES: I am not ready to concede it's a second much less a minute.

THE COURT: Well, on its face it says "ITOC Meeting" or these all say ITOC Meeting, and they purport to be signed by somebody, Benjamin Weiner, secretary. Was Benjamin Weiner the secretary of ITOC at that time?

MR. MC GRATH: I was.

THE COURT: Is this his signature?

MR. MC GRATH: I don't know. He died in 1968.

MR. WENTZEL: We have a stipulation as to authenticity.

MR. NESSEN: I don't think there is any question of authenticity. I conceded authenticity.

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MR. DINKES: If your Honor please, let me be heard on that. In the first place, when I came into this case in November of 1968 I asked for every single paper in the case that mentioned my client Nathan Levine.

I was not supplied with this paper. I was never asked to stipulate as to its authenticity and I am not ready to stipulate now to its authenticity.

THE COURT: Nobody is asking you to.

MR. DINKES: When I asked Mr. Wentzel if I am going to hear my client's name again in this case, he tells me that there were some minutes at this meeting.

MR. WENTZEL: These minutes are listed in our pre-trial memorandum way back in 1970 when Mr. Levine was represented by other counsel. That counsel stipulated to the authenticity in the pre-trial order.

MR. NESSEN: In any event, isn't this marginal though? How does that bring Mr. Levine -- that he agreed to a fare increase?

THE COURT: I think it's marginal. It proves a perfectly innocuous thing on its face, that is, that Mr. Levine agreed to go along with the fleet owners on a position before the City Council.

Now, obviously you are using that as part of a picture and you have got to prove something more than that.

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MR. WENTZEL: That's right.

THE COURT: But as part of the picture, if these are minutes, of something that happened.

Just a moment, let me look at the rules.

(Pause.)

THE COURT: Well the reference I have got, Mo. Wentzel, is 803(6) and I think this -- I don't find anything in the rules specifically relating to minutes, but it seems to me that it would come, minutes would come under records of regularly conducted activity, and I think if there is an objection, you have got to lay a foundation, so I am afraid that I have got to sustain the objection for the moment. Maybe there is a way you can lay a foundation.

MR. NESSEN: Your Honor, going back to Exhibit 50, I may have heard Mr. Wentzel incorrectly. I thought he said that his requests to charge had citations to Anti-Trust cases. Those aren't Anti-Trust cases to which he cited --

THE COURT: We'll see how much they prove and we'll look at them.

Now 36 is a meeting of August 26, 1964. Is there any objection?

MR. MC GRATH: The same objection, I believe. I thought that was the same objection by all of us to that.

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THE COURT: I will have to sustain that for the moment.

Now look --

MR. WENTZEL: Your Honor, the reason I haven't laid a foundation here is that -- your Honor, in the pre-trial order in this case, paragraph 4, Roman numeral 4 states the parties agreed that all the documents listed in their respective pre-trial memoranda as those they intended to offer in evidence at trial are deemed authentic and may be offered in evidence subject only to objection to their relevance and materiality.

THE COURT: Okay. Is that signed by counsel for Nathan Levine?

MR. WENTZEL: Yes.

THE COURT: And was there reference in a pre-trial memo to these documents?

MR. WENTZEL: I have it right here. Minutes of ITOC meetings 1964 to 1966, and those were all in a stack, they were produced to counsel.

THE COURT: You are representing that this was part of the group that was referred to?

MR. WENTZEL: Absolutely.

THE COURT: I think that changes it.

MR. DINKES: I don't think it does at all. It

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doesn't change it because of the fact that I did not represent Nathan Levine. This lawsuit against Nathan Levine lapsed with his death, and --

THE COURT: Can we put a stop to that right now. I will not sustain that objection. I would not expect you to have -- be able to take new positions departing from the pre-trial order without giving specific notice of that, and that's that. I will overrule the objections to 36 to 39 and I have got some things to go onto.

MR. DINKES: May I finish for the record. I represent his estate. I have been retained by his widow and his children. There was never ever shown to me this document. I was never asked to concede to its authenticity, and I will tell you very frankly that if I would have represented Nathan Levine if he was still alive, I wouldn't concede to the authenticity of these documents and I except to your Honor's ruling.

THE COURT: Thank you very much.

MR. MC GRATH: Just briefly, please note my objection to these documents all on the basis of relevancy. They are not probative of anything other than the fact that at one time the parties got together on one issue, a fare issue.

MR. NESSEN: We understand there is one section

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every section that is not --

THE COURT: 38 you will take care of excluding that one phrase and 50 I have got to reserve on.

Now I know that we have got to eat and get phone calls and all, and I will relieve the reporter, but I have got to finally come to grips on this lost profits thing, and I think --

(Discussion off the record.)

(Luncheon recess.)

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AFTERNOON SESSION

2:30 p.m.

(In open court, jury not present.)

THE COURT: Okay, Mr. Kobak, could you come up, please.

JAMES B. KOBAK, resumed.

EXAMINATION BY THE COURT:

Q I would like to just confirm on the record the questions and answers that I addressed to you and you gave me off the record during the noon hour when the reporter was at lunch.

As I understand it, in the testimony you have given so far and the opinions that you have expressed you have not taken into account one way or the other any possible dispute between Mr. Wysinger and Mr. Peterman; is that right?

A That is correct.

Q And you have not taken into account one way or the other any possible dispute between Mr. Peterman and the fleet owners who were subscribers, right?

A That is correct.

Q Now, do I understand that if you were indeed valuing Taxi Weekly back in the spring of 1964, or if you were attempting to predict the future profitability of the corporation, and you learned of a possible dispute between Wysinger and Peterman, and a possible dispute between Peterman and the fleet owner subscribers, you would wish to find out the facts about those matters?

A I would. I might differentiate a little bit though. If the dispute were between Wysinger and Peterman and Peterman had been operating the magazine for many years without Wysinger, essentially, I might not look into that dispute because presumably he had been operating, but if there were with the taxi fleets, I certainly would want to investigate to find out how serious it was.

THE COURT: I have looked at the cases over the lunch hour as best I could on this question of the lost profits matter. I think that we have to now make a decision one way or the other and stick to it as to whether that is to come in or not.

Now, I indicated off the record, and I will state again, that -- let me backtrack.

I think at the recess it was this morning, Mr. Wentzel, in an off-the-record discussion, requested me to reconsider the ruling that I made and I appreciate that because I had thought about that overnight, and it gives me some concern.

During the noon hour we had another off-the-record discussion and at that time the parties gave me what authorities they could on the subject as far as the legal guidelines to use, and I am going to adhere to the position that I took yesterday, and I will not permit evidence on the lost profits theory.

I am reinforced by the cases, and I won't repeat the discussion we had yesterday, but there is a whole range of factors which I am considering.

First of all, I am considering the fact that the matter has not been developed in discovery. I recognize the problem Mr. Wentzel posed to me that when he first came into the case, around 1970, he attempted to develop this by opposing a rival paper and that he later, I think, made a similar attempt, and was blocked.

On the other hand, I think that there would have been a way -- and I keep emphasizing, I do not criticize counsel in any regard because I just don't think that would be in order at all, but faced with the problems we are faced with now, I must say that I think there would have been a way to get this matter developed and prepared before trial even if it was a week or two weeks before trial. We would be better off than suddenly facing the problem on the fourth day of trial as we did yesterday.

That is a factor, although if the line of proof were really promising and valid, I think that perhaps we could surmount the procedural problem. But I look at two authorities which I think are quite persuasive.

One is Judge Pollack's decision in this court in Vanderveld against Putt & Caul, and so forth. The copy is sliced off. I can't even tell what the citation is.

MR. NESSEN: 344F Supp.

THE COURT: They say it's 344F Supp. Well, it's April 14, 1972, and the parties can supply the citation if it's necessary.

And I also rely on Farmington Dow Elegance Foster, 421 Federal 2nd, 61. I won't take time to analyze trose cases, but state the cases and it indicates to me that in the situation we are now involved in it wouldn't be an admissible line of proof or an admissible theory.

I have particularly in mind here that there are elements which would render, in my view, extremely speculative to try to put ourselves back in 1964 or 65, or 66, and attempt to predict the continued existence of Taxi Weekly through the present time or for any appreciable number of years and to predict profitability.

There are a number of factors which make this kind of prediction extremely speculative. The company did not in fact exist during those years.

As of the spring of 1964, if we can put ourselves back before the alleged conspiracy, the proof is overwhelming that there was a very serious dispute between Mr. Peterman and his clients, his main customers, the fleet owners.

The plaintiffs contend that that disagreement was acted upon in an illegal manner, but whether they prevailed or not, on that point the fact remains that there was a very serious dispute between Mr. Peterman and these fleet owners, and Mr. Kobak has very frankly told me that would be a very important consideration to at least inquire about if he were trying, back at that time, to estimate the future profitability.

He has told me that in his testimony thus far he has not been able to consider that question one way or the other, and I assume he has no information on the subject which he can use. He hasn't so far.

Now, that's just one factor among others which, to me, would make it a matter of pure speculation for the jury to try to estimate profitability and existence of Taxi Weekly over the years that are sought to be proved, so I have to make a ruling one way or another and that's the ruling.

As far as Exhibit 50, I see no -- I don't know that we finished our work on that. We were concentrating on the other problem and I don't see that I have to maybe finally rule on that, but thus far I don't see any justification for allowing the jury to apply an inflation index to the going concern value of the business, but I would like to reserve a little longer on that because I don't think we really finished the work, so let's bring the jury in and let's finish the plaintiffs' case and move on to the defense.

MR. NESSEN: I didn't want to cross-examine Mr. Kobak.

MR. MC GRATH: I think that we had one or two questions briefly.

(The jury entered the courtroom.)

THE COURT: Is there any further question of Mr. Kobak?

MR. DINKES: Yes, your Honor. I think this morning Mr. Kobak was going to check his notes to see if he had any note as to how many of the issues of the magazine were free and how many were paid for.

CROSS-EXAMINATION

BY MR. DINKES:

Q Do you have any notes on that?

A The magazine we are talking about now?

Q Yes.

A A very small number were paid for.

Q That's not my question.

MR. DINKES: I move to strike that as not responsive.

A 10,400 total circulation.

Q That's not my question. My question is do you have any notes as to which were free and which were paid for.

A I couldn't find them here.

MR. DINKES: Thank you. That's all I wanted to know.

THE COURT: Anything?

CROSS-EXAMINATION

BY MR. MC GRATH:

Q In reviewing the records, did you also review your notes for a record of the circulation of Taxi Weekly in the year 1964?

A Yes.

Q Do you have that figure, sir?

A The circulation of Taxi Weekly was 11,000 plus. I showed you the figure before.

MR. NESSEN: I'm sorry. I didn't hear that.

Q Was that 11,000 each and every week, sir?

A No. That's the average. 11,070 actually.

Q 11,070 for each week during 1964?

A That's the average of the first half of 1964.

Q For the first half?

A Right.

Q All right. Now how about 1963?

A 1963 was 11,595.

Q And 1962?

A 12,110.

Q And 1961?

A 13,501.

Q 13,000?

A Yes.

Q And those were the years that you used in basing your evaluation of this company, '61, 2, 3 and 4?

A Yes.

Q Where did you receive these figures of circulation?

A From Mr. Peterman.

Q Mr. Peterman told you that?

A Yes.

Q Did you verify those figures at all?

A I did not verify them.

Q Well, would you, in valuing a business such as Taxi Weekly, was the figure of circulation an important element in your evaluation?

A Of course.

Q Would you say it was one of the most important elements together with the advertising revenue?

A The fact that he was covering the market, yes.

Q So circulation, together with advertising, was very important?

A Yes.

Q Would you say circulation was more important than advertising?

A No. I think we said earlier that you need all parts of a magazine, really.

Q But circulation leads to more advertising, to more revenues?

A Yes.

Q So it's a "Tinkers to Evans to Chance situation"?

A Yes.

Q You start with circulation?

A You start with editorial, then circulation and then advertising.

Q So advertising is less important because it depends upon circulation?

A No, I wouldn't say that.

Q When did Mr. Peterman give you these figures of.

11,000, 11,500 and 12 and 13,000?

A I guess last November when we first started talking about it.

Q Did you attempt to verify them at all?

A No.

Q Would you consider, sir, a review of the affidavit of ownership and circulation which is filed with the postal authorities each year as important in determining the value of such property as Taxi Weekly?

A As I recall, that affidavit has to do with second-class circulation only.

Q It does?

A I believe so; yes.

Q Not total circulation?

A That's right.

Q You are experienced, of course, in the publication field?

A I think it includes the print order.

Q Doesn't the print order reflect upon circulation, sir?

A Not necessarily.

Q You mean you can have more of a circulation than a print run?

A No, you can have more of a print run.

Q Does this affidavit of ownership and circulation indicate the print run?

A Normally, yes.

Q It does?

A Yes.

Q And is that a sworn statement filed with the P.O.?

A I believe it's published in the magazine itself once a year.

Q And it's certified to be true and accurate; is that correct?

A Yes.

Q Would this be a relatively simple way of verifying circulation figures?

A Yes.

Q Do you consider it important in arriving at a valuation of a publication that you review the affidavit of ownership and circulation?

A Normally, no.

Q You don't consider it to be important?

A No.

Q Well, do you have them review it?

A Not that I can recall.

Q Do you think --

A Unless I suspect something is wrong.

THE COURT: We are belaboring this. His position is that he didn't and he doesn't think it's important.

MR. MC GRATH: At this time, your Honor, I would like to read a document which is already in evidence because it's in the bound volume of Taxi Weekly for 1964. The statement of ownership management and circulation, and bottom line reads: "I certify that the statements made by me above are correct and complete." Signed Les Peterman.

THE COURT: What is the date of this document?

MR. MC GRATH: October 12, 1964.

At the bottom it says "(A) Total number of copies printed (net press run)" and then there are two columns. The first column, average number of copies each issue during the preceding 12 months: 6,326. Single issue nearest to filing date: 5,880.

Q Mr. Kobak, I asked you also to determine the number of paid subscriptions to Taxi Weekly that were sent through the mails. Do you have a figure on that, sir?

A I don't have a precise figure, no.

Q Did you ever receive a figure from Mr. Peterman on that?

A I believe so.

Q What was the figure?

A I don't recall it at this point.

Q You don't recall, sir?

A No.

Q Do you recall earlier today when you spoke to me --

A I told you that I thought it was in the neighborhood of 8,000.

Q The paid circulation --

A Not for that year, however, if you recall, because the circulation, as I understand it, declined after June 30.

Q Well, for what year did you receive information from Mr. Peterman?

A The first half of 1964.

Q And what was that figure?

A About 8,000.

Q Now that was 8,000 paid subscriptions mailed through the mail?

A That's correct.

Q Did you verify that figure?

A No.

Q I read now under paid circulation. Withdrawn.

Did you tell me earlier today that you had a recollection that the paid circulation, that is subscribers who paid by cash or check for their weekly copy of the newspaper, was less than a thousand?

A No. The paid circulation of the owner drivers.

THE COURT: I don't mean to interrupt you but I am confused with the figures. In the first place, you are reading figures or averages for October 1964.

Now, the facts about the subscription cancellation will be stipulated I guess momentarily, but I assume that they are going to show that there were some cancellations beginning in July, so how does it really help us to read a bunch of October figures, or even averages based in October, and can't somebody come up, if it's relevant, with the facts as of May or June or whatever it was.

MR. MC GRATH: Judge, we have the figures now for each of the years that Mr. Kobak used for his circulation figures from Mr. Peterman, and he said in 1961 there were 13,000. I will now read to you what the total print run was in 1961.

THE COURT: What about '64? I am questioning an October '64 recital. It doesn't mean much to me and I don't know how it could mean much to the jury, but sometimes I assume I have the same questions as the jury.

MR. MC GRATH: Of course.

Q Mr. Kobak, is there any indication to you that the print run was less at any time in any given month for the preceding 12 months from October of '64?

A Say that again. Is the print run less when?

Q This affidavit reports on the 12 preceding months?

A Yes.

Q That would be from September '64 through October '63 going back?

A Right.

Q For those 12 months did you receive any indication that the print run varied from month to month?

A I'm sure it did. It does for any magazine.

Q Would it be a substantial variation, would it be in the thousands?

A It probably would be after July and the cancellation of the subscriptions.

Q Now let's use the figure then for 1963 because there were certainly no cancellations in '63, were there?

A Not of the same type.

Q The figure you had for '63 was 11,500?

A Yes.

THE COURT: I must apologize but what were these? The circulation figures you gave us earlier -- '64 was what?

THE WITNESS: 11,070.

MR. NESSEN: That was based on the first half.

THE COURT: This was average issue?

THE WITNESS: Average issue.

THE COURT: Okay.

THE WITNESS: And 1963 for the full year was 11,595.

THE COURT: Okay.

THE WITNESS: 1962 was 12,110.

THE COURT: Okay.

THE WITNESS: 1961 was 13,501.

THE COURT: All right. Thanks. Now we are getting to '63, right.

BY MR. MC GRATH:

Q 1963 was 11,595 as told to you by Mr. Peterman?

A Correct.

Q The statement of ownership management and circulation.

THE COURT: What is the date?

MR. MC GRATH: October -- in the Taxi Weekly for Monday, October 14, 1963.

Total number of copies, net press run: average number of copies each issue during the preceding twelve months: 6,010.

Single issue nearest to filing date: 6,500.

Q Now Mr. Kobak, that is a substantial variance from the figure of 11,595 that was given to you by Mr. Peterman; isn't that correct?

A Yes, it is. It's my understanding that part of the copies were sent second-class and part third-class which would account or may account for the difference.

Q This statement says that the total for the net press run is 6,010; isn't that correct? Do you want to look at it?

THE COURT: Why don't you show it to him so that there is no misunderstanding about what you are reading to him.

(Pause.)

THE COURT: Is this from an exhibit?

MR. NESSEN: That hasn't been marked yet.

THE COURT: Let's get a reference. After Mr. Kobak has looked at it, let's get it marked.

MR. MC GRATH: To save time I will offer each preceding year in order.

THE COURT: All right, what is the question?

Q Does that affidavit of mailing state that the net press run for 1963 on an average basis over 12 preceding months is 6,010?

A Yes.

THE COURT: Can you get this document marked and admitted or whatever needs to be done.

xxx (Defendants' Exhibit AX marked for identification.)

THE COURT: Anything further?

MR. MC GRATH: Yes. In 1962.

Q Your figure from Mr. Peterman was 12,110; is that correct, sir?

A That's right.

MR. MC GRATH: I offer in evidence the October 8, 1962 edition of Taxi Weekly, your Honor.

xxx (Defendants' Exhibit AY marked for identification.)

THE COURT: You didn't offer AX. Did you mean to?

MR. MC GRATH: I'm sorry.

THE COURT: Is there any objection to AX? I don't hear any. Are you offering AY also?

MR. MC GRATH: Yes.

THE COURT: I don't hear any objection so I will receive both.

xxx (Defendants' Exhibits AX and AY for identification received in evidence.)

MR. MC GRATH: Can we offer as AZ the 1961 October issue?

THE COURT: All right, I will receive that also.

xxx (Defendants' Exhibit AZ received in evidence.)

MR. MC GRATH: I now read from Exhibit AY in evidence, your Honor. Ownership statement, paragraph 5. The average number of copies of each issue of this publication sold or distributed through the mails or otherwise to said subscribers during the 12 months preceding the date shown above was (this information is required by the Act of June 11, 1960 to be included in all statements regardless of frequency of issue) the number is 5,575.

Q Mr. Kobak, of course that is quite a discrepancy.

THE COURT: You don't have to argue. Come on, let's just read the figures.

Q What was your figure for 1961, Mr. Kobak?

THE COURT: 13,501. Now what is your figure?

MR. DINKES: It was not Mr. McGrath's figure; it was Mr. Peterman's figure, your Honor.

THE COURT: I think the jury gets the point.

MR. MC GRATH: I read now from Exhibit AZ, the October 1961 edition of Taxi Weekly, the sworn statement of Les Peterman, paragraph 5, the average number of copies of each issue of this publication sold or distributed through the mails or otherwise to said subscribers during the 12 months preceding the date shown above was 5,436.

Q Now Mr. Kobak, I want to pose a question to you in a hypothetical form.

I want you to assume the following state of facts:

That there was a dispute between the owners of this publication, Taxi Weekly, for the years 1963 and 1964.

Further assume that the dispute between the editor and publisher, Les Peterman, continued over and became a dispute between Peterman and the main source of his circulation, that is the fleet owners of the taxi industry in the City of New York.

Further assume that the figures of circulation that were given you were erroneous in that they were approximately 50 percent of the figures given to you at the time that you valued this publication.

Do you have an opinion as to what the value of this publication is, and with these set of facts that are now assumed to have been in the record, would they change your opinion?

MR. WENTZEL: I object on the grounds that all three of the bases of that hypothetical question do not have support in the record and all three are incorrect.

THE COURT: Well, I think -- ladies and gentlemen, when there is a hypothetical question it is based on certain facts, then the first job of the jury in evaluating that question is to determine the facts.

I think that the jury will have to determine what the facts are, but with that instruction I will allow the hypothetical question.

A Could I have that question, all those assumptions read?

THE COURT: Read the question again.

Q Assume in the evaluation of this publication the following three facts, in addition to everything else that you assumed or that you had before you when you were evaluating.

First that there was a dispute between the owners of the publication.

Secondly, that there was a dispute between the editor and publisher, Les Peterman, and the source of his circulation, that is the fleet owners and operators in the City of New York, which was the main source of his circulation.

And third, assume that the circulation figures that were given you by the publisher were inaccurate in that they were approximately 50 percent in the affidavit that you filed with the U.S. Postal Department.

Would those three assumptions change your opinion as to the value of this publication that you gave before in your sworn testimony?

MR. WENTZEL: Same objection.

THE COURT: Overruled.

A As to assumption number one, the argument with his partner, as far as I am concerned, since his partner had been inactive for many years, and Mr. Peterman was running the magazine, that one wouldn't worry me.

Assumption number two, that there was a dispute with the fleet owners, I would certainly want to investigate to find out how serious it was and what it might mean, but I can't really answer the question as to the value at this stage.

Question number three, if the circulation were in fact, which I haven't agreed to, obviously, half what I had been told, obviously that would have an effect.

THE COURT: Can I ask you this:

Is it correct -- this relates to the matter we were discussing before, but I think it might assist the jury to be clear on this: Is it correct that in your testimony and in your opinions you assumed nothing, no facts one way or the other as to anything about any possible dispute between Wysinger and Peterman and nothing about any dispute between Peterman and fleet owner customers?

THE WITNESS: That's correct.

THE COURT: Okay.

Q Now, earlier, sir, I asked you about circulation, and you said one of the elements of circulation was that it covered the market; is that correct?

A That's correct.

Q Now, were you able to determine, in your study of Taxi Weekly, what the potential market was for this publication?

A In that there were approximately 7 or 8,000 full-time drivers of fleet cabs and about 5,000 independent owners making a total of 12 or 13,000, that circulation of 11,000, which is what I understood it had, would certainly cover the market.

Q Would a circulation of 6300 in 1964 cover the market?

A It possibly could.

Q Would a circulation in 1963 of 5500 cover the market?

A It possibly could cover the most important elements of it.

Q Would a circulation in 1962 of 5500 cover that market?

A The same answer.

MR. MC GRATH: No further questions.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. WENTZEL:

Q Mr. Kobak, would it make any difference to the opinion you originally gave based on the 11,000 plus circulation figure if some of those papers, when they were sent out to the subscribers, bore the name Taxi Age instead of the name Taxi Weekly but otherwise in all respects it was exactly the same newspaper with the same editorial content, the same advertising, and so forth?

In other words, would it make any difference?

THE COURT: Would it make any difference to whom?

Q To you, to the opinion you originally gave, as to the value of Taxi Weekly, Inc. if some of the newspapers bore the name Taxi Age.

A It wouldn't make any difference to me.

MR. MC GRATH: I will object to the question, your Honor. It is introducing an entirely new element in the case at this time. I never heard of the words Taxi Age before. Is there going to be another plaintiff in this case?

THE COURT: I will sustain the objection.

MR. WENTZEL: He says he never heard of it. It was in the proposed stipulation.

THE COURT: Let's have the lawyers up here. I want to see the proposed stipulation.

MR. NESSEN: I have it right here.

(Discussion at the bench off the record.)

THE COURT: On the point, at least as far as I am concerned, the first reference I ever saw to anything called Taxi Age occurred in the proposed stipulation of the plaintiffs circulated early last week. It talks about the fact that Taxi Weekly, Inc. was incorporated in 1945 and until 1946 published a weekly newspaper called Taxi Weekly and during the same time also published a monthly magazine called Taxi Industry.

Paragraph 2 of the proposed stipulation says Taxi Weekly sometimes and in some cases called Taxi Age has been published since 1933 and was directed primarily to the taxicab industry in the City of New York consisting of owner drivers, fleet drivers, fleet owners.

Now, I don't think any of us zeroed in on this in our discussions but I for one interpreted Taxi Age to be a predecessor, an old publication that probably came, existed with the name the publication as it was in the thirties and early forties.

Now it appears, according to Mr. Peterman's contention, that the balance of the circulation numbering some several thousand copies issue between the amounts stated in Taxi Weekly's affidavits of ownership, the balance of the circulation between those figures and the figures he gave to Mr. Kobak for the purpose of Mr. Kobak's testimony is all made up of circulation of the publication called Taxi Age, and this is an element which certainly takes me by complete surprise.

Now are there records that can be relied on to say what is what?

MR. WENTZEL: You understand it's not a different paper other than the name.

THE COURT: The name is very important and I don't know whether it's a different paper or not. I don't have copies.

MR. PETERMAN: Your Honor, I can bring in a copy of the same issue.

THE COURT: Tomorrow is Saturday. I think this is inexcusable beyond anything that I can ever voice, and if you don't understand it, to me I don't understand why you don't understand it.

Now this is Friday afternoon. Everybody knew that circulation figures, statistics about this, the identity, the name was all intensely important in this case. It is now after three o'clock on the fifth day of trial when we are trying to finish today or at least very close to the day, have summations on Monday, and I find it an absolute outrage to be faced with this.

Now what are the facts?

MR. PRATT: Your Honor, this is a book listing per fleet bulk subscriber.

THE COURT: Does it show what was Taxi Age and what was Taxi Weekly?

MR. PRATT: I don't believe so, your Honor.

THE COURT: In the depositions of every single fleet owner that you have taken all of the references were to Taxi Weekly. There wasn't a single reference to Taxi Age. Nobody has testified as to subscribing to Taxi Age.

I'm not going to permit proof on this. The Complaint in this action, paragraph 3 refers to Taxi Weekly. The case is going to be about Taxi Weekly and stands or falls on that, and if there is a confusion, you bear the brunt of it.

MR. WENTZEL: I don't understand why your Honor is making this great distinction with the name.

THE COURT: If you don't understand it, you talk to the Court Appeals about it, but I understand it.

MR. WENTZEL: No one has in the entire case, not the defendants or anybody. They stipulated to 11,000 as the circulation figure.

THE COURT: But it was about Taxi Weekly.

MR. WENTZEL: Of course, but it's the same paper.

THE COURT: I don't know whether it is the same paper or not. I haven't seen the copy. You didn't testify about it on your direct. You never said a word about it.

MR. WENTZEL: It was in the stipulation.

THE COURT: You said it suddenly.

MR. WENTZEL: They raised it at the last minute for the first time in nine years.

THE COURT: You raised it. You based the case on Taxi Weekly and not on this other paper.

MR. WENTZEL: I respectfully except.

(In open court.)

THE COURT: I will not permit any reference to Taxi Age. There was no testimony by Mr. Peterman about Taxi Age in his direct. The case is about a publication called Taxi Weekly and other things that have been heretofore referred to, and whether Taxi Age was or was not the same paper with a different masthead is something that is not in evidence, and I'm very sorry but I cannot permit any reference to that subject. So that's that.

Is there anything further?

BY MR. WENTZEL:

Q Mr. Kobak, based on the assumption that the figures given you -- assume the circulation figures were as Mr. McGrath had read, can you tell us to what extent

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that would affect your valuation of Taxi Weekly, Inc.'s -- your valuation of Taxi Weekly, Inc.?

A I can't quantify the difference at this particular moment because I would have to get a feeling for how well that 6,000, or whatever it is, covered the market; who they were.

MR. WENTZEL: Thank you.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Anything further?

MR. NESSEN: We have nothing, your Honor.

THE COURT: Do you rest?

MR. NESSEN: I'm sorry. I thought you meant Mr. Kobak.

THE COURT: Is there anything further in the plaintiffs' case?

MR. WENTZEL: Yes, your Honor.

THE COURT: Okay.

MR. WENTZEL: I would like to recall Mr. Peterman to the stand.

THE COURT: All right.

SEYMOUR PETERMAN, recalled as a witness by the plaintiffs, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. WENTZEL:

Q Did you have advertisers in Taxi Weekly who were located in states other than New York?

A Yes, I did.

Q Would you identify them, please?

A (No response.)

Q Would you also identify or list for us, if you have it there, the revenues from each of those advertisers in the year 1964?

A Yes. Rockwell Manufacturing Company, Pittsburgh. Pennsylvania, $742.35.

THE COURT: You are giving us '64, fiscal '64 figures, advertising revenues?

THE WITNESS: That's right.

THE COURT: From Rockwell in where?

THE WITNESS: Pittsburgh, Pennsylvania.

THE COURT: All right.

A (Continuing) Chrysler Manhattan Service, $713.46.

Q Mr. Peterman, let me just stop you there on Chrysler Manhattan Service. Is that an organization by name which is located here in New York?

A That's right.

Q Where was the advertising placed with respect to that organization?

MR. NESSEN: I don't know what you mean by placed.

THE COURT: Objection overruled.

A That was placed in New York.

Q Was there any advertising relating to Chrysler placed outside New York?

A All the advertising for Chrysler came from outside of New York but for this particular service station, service center, I think it was, this advertising came from New York.

Q All right. Go ahead. Continue.

A Halicrafters from Chicago, Illinois, $53.

Chevrolet, Detroit, Michigan, $900.

MR. NESSEN: Your Honor, I am not sure. Are we saying Chevrolet came from Detroit, the ads, or is that where Chevrolet is located?

THE WITNESS: Both.

MR. NESSEN: Okay.

THE COURT: And Halicrafters, was the advertising placed between New York and Chicago?

THE WITNESS: Yes.

THE COURT: Is that right?

THE WITNESS: I believe Halicrafters was also in Chicago.

THE COURT: Have you got a list there?

THE WITNESS: Yes, sir.

THE COURT: Can I see that list?

(Pause.)

THE COURT: Now this list has the names of some companies and amounts, right?

THE WITNESS: Yes.

THE COURT: What you are going to do is to read down and put into the record these companies, places and amounts; is that right?

THE WITNESS: That's right, yes, sir.

THE COURT: Now, you would testify to what is in these lists?

THE WITNESS: Yes, sir.

THE COURT: Now, when you have a place, it's the location of the company; isn't that right? Like Chevrolet, Detroit, Michigan, is that what you meant to put in here?

THE WITNESS: It's either the company or where the bill was sent to.

THE COURT: The bill for what?

THE WITNESS: For the ad.

THE COURT: For the ad?

THE WITNESS: Yes.

THE COURT: What I would like to do is to somehow try to simplify, and would this generally be -- it doesn't make any point to read a list. It just doesn't.

MR. NESSEN: Can we approach the bench and see what you are talking about, Judge, and maybe we can do something about it.

THE COURT: All right.

(Discussion at the bench off the record.)

MR. NESSEN: Your Honor, I am thinking aloud but I would say that I am willing to stipulate that in category 1 here, wherever there is the name of a company with an address outside of New York State, that in fact the advertising is a place or went through, or the bills were received from a place outside of New York listed in the list. I have no problem with that.

THE COURT: Is that agreeable?

MR. WENTZEL: Can we get the amounts in?

THE COURT: Let's introduce this list containing the amounts. How about Mr. Dinkes?

MR. DINKES: I have no objection.

MR. MC GRATH: No objection.

(Discussion off the record.)

THE COURT: We have been trying to figure out a way to simplify the completion of the record on the Interstate Commerce point and I have advised counsel that according to the proof thus far in the case, the proof that is proposed, I am certain and I will state to counsel that I will rule as a matter of law that there is a sufficient Interstate Commerce nexus to sustain jurisdiction under the Sherman Act, and I will not submit that to the jury and I would invite counsel to complete their record on that point at such time as the jury does not need to be here.

MR. NESSEN: We take an exception and stand by our requests to charge, your Honor.

MR. MC GRATH: Exception.

(In open court.)

THE COURT: Does that leave anything else?

MR. WENTZEL: Your Honor, yes.

BY MR. WENTZEL:

Q Mr. Peterman, did there come a time when Taxi Weekly began to incur cancellations of its advertising?

A Yes, there did.

Q Would you tell us what advertisers canceled or cut back, or did not renew their advertising in the period after June 30, 1964?

A Yes. Future Motors cut back December 7, 1964, and they canceled completely on February 19, '65.

Chrysler Corporation canceled about October 29, 1965.

THE COURT: You are reading from a summary?

THE WITNESS: Yes.

Q Let me ask you about that. Mr. Peterman, have you gone through your records to examine the various dates when you got cancellations and so forth?

A Yes.

Q And you put those down in summary fashion here that you are now giving us?

A Yes.

THE COURT: I think we saw the other day the underlined documents from which the summary is taken, right?

MR. WENTZEL: We have them here in court, your Honor.

THE COURT: Are you going to introduce those underlined documents?

MR. WENTZEL: I can.

MR. NESSEN: We have Exhibit X-1 that really shows that, your Honor.

THE COURT: I think it makes a lot of sense if you would like to introduce as exhibits the underlined documents, those monthly sheets that we saw and the summary. I see no purpose in having that read.

MR. WENTZEL: You mean the summaries of the amounts paid by each advertiser?

THE COURT: The little document with the boxes month by month.

MR. NESSEN: It's X-1.

MR. WENTZEL: I think it's already in evidence.

THE COURT: All right.

MR. WENTZEL: I put it in this morning, it's Exhibit 29. That shows the amounts. I wasn't asking him about that.

THE COURT: I think it would help the jury to have the summary, so I will receive that, too.

MR. NESSEN: Could I see it, your Honor?

THE COURT: Yes.

MR. NESSEN: Well, as a summary of what the witness would testify, I don't have any objection to it.

THE COURT: Okay. That's the way we'll receive it.

xxx (Plaintiffs' Exhibit 111 for identification received in evidence.)

MR. WENTZEL: Your Honor, may we approach the bench.

THE COURT: Sure.

(Discussion at the bench off the record.)

(In open court.)

BY MR. WENTZEL:

Q Now Mr. Peterman, did you have any conversations with anyone with respect to the cancellation of advertising by Chrysler Corporation?

A Yes, with several people.

Q With whom was the first such conversation?

A I believe the first conversation was with an account executive in Detroit for the agency that handled the account for Dodge.

Q Do you recall the name of that agency?

A BBD&O. Batten Barton Durstin & Osborne.

Q Do you recall when this conversation took place?

A It was around the end of October in 1965.

Q What was said in that conversation?

A Well, I received a phone call --

MR. NESSEN: Your Honor, we have our continuing objection to this.

THE COURT: I'm sorry. We'll take our afternoon recess. We have got further problems. Just a short one.

(The jury left the courtroom.)

(Discussion at the bench off the record.)

(Recess.)

(In open court.)

BY MR. WENTZEL:

Q Mr. Peterman, did you have some conversations in connection with the cancellation of the Chrysler advertising?

A Yes, I did.

Q I believe you testified a little earlier that it was around the end of October 1965 and you were about to tell us about a conversation with Mr. O'Leary.

A That's right.

Q Would you go ahead, please. Would you just tell the jury again who he was.

A He was the account executive who handled the Dodge account, at least for taxicabs, at BBD&O in Detroit. And he called me up and talked about canceling some ads. First he asked what ads were scheduled, and I tried to tell him as best I could, and then he mentioned something about wanting to cancel an ad that hadn't been scheduled.

THE COURT: I guess we got the date before, October of '65, about?

THE WITNESS: The end of October.

THE COURT: All right. Go ahead.

A (Continuing) But I wasn't sure so we concluded that conversation and I searched my files and I saw that the ad hadn't been scheduled.

There were a few phone calls back and forth to various people at the agency including the space buyer, a gentleman by the name of Gil Pacewitz. He queried me about the ownership of Taxi Weekly. He advised me that --

THE COURT: This is Pacewitz?

THE WITNESS: That's right.

THE COURT: That he had been?

A -- that he had been told that Checker and Morris Marken --

MR. NESSEN: Your Honor, when he said he had been told, can he use the name?

THE COURT: What you are giving us is your best memory of the conversation and to the extent you recall who was referred to, of course give it. If there was no specific reference, tell it that way, right. But to the extent that there was any reference to specific persons, tell us.

A (Continuing) He did not want to tell me --

THE COURT: He is saying that, right?

THE WITNESS: Yes.

THE COURT: Go back. I think we should start again with the Pacewitz conversation because we may have gotten it a little out of order, okay?

A (Continuing) He called up on this matter of the cancellation of an ad that had not arrived yet and had not yet been ordered, at least as far as my receipt of it went. And one of the things that he talked to me about was that he had been told that Checker or Morris Marken either owned or controlled Taxi Weekly, and he was asking me about it.

I told him that this was completely untrue, and I asked him where he had gotten this information from, and he said that it had come from the field, or in New York.

I believe I suggested to him that whoever supplied that information should contact me and get the true facts. I told Pacewitz that if he were to write me a letter stating that he had heard this and wanted to know what the facts were, I would send him an affidavit that I was the owner, the sole owner of Taxi Weekly, nobody else controlled it, nobody else had money in it in any way.

He said he would look into the matter further.

About a month later, I called him back to find out what was happening. We reviewed the whole situation again. We again went into -- he asked me again about the ownership question, the question about Marken or Checker controlling or owning Taxi Weekly.

I again requested that if there was any doubt whatsoever, that he should send me a letter requesting this information and I would send him an affidavit, and that I believe I said to him in that conversation also that if anybody else had any doubt, that they should contact me rather than talking about this thing, which was untrue.

It concluded that he was going to look into this thing further and get back to me about resuming the advertising, but he never did and the advertising was never resumed.

Q What kind of an advertising agreement did you have with Chrysler at the time he canceled?

A At the beginning of the month of October I received a 13-time contract which meant that Chrysler --

MR. DINKES: If your Honor please, I would like to state that the contract speaks for itself. If there is a contract --

THE COURT: Objection overruled.

The beginning of October what did you do?

A I received a 13-time contract from Chrysler which was similar to what was received each year. They generally ran at least 13 times. And specified a rate that was applicable to a 13-time contract which, of course, was lower than if they had run a lesser number of times.

Q The rate per ad you mean was less if they ran 13 times than if they ran just one or two?

A One or two, or six. Six was the next step and one was the other step.

They in fact ran only once or twice in October. it was, before this series of conversations started in.

Q Did you receive any further communication from

Chrysler?

A About a year later, after the year had expired, they sent me a formal notice dropping the 13-time rate down to the one-time rate for the ad or two that had been run, and therefore I short-rated them. I had to charge them more per ad for the ad that had been run because it had been billed at a lower rate assuming that they were going to run the contract at 13 times.

Q Did any of your other advertisers receive a short rate because of cancellations during this period of time?

A Yes. Future Motors, which was my biggest advertiser, and was the Dodge dealer in New York City.

I received a notification of cancellation from them, or a cut back in December.

Q Of?

A Of 1964. They were on a calendar year basis. They had run every issue in 1964 as they had for a number of years. I believe it was half a page. In every issue of '64. And so they got the lowest rate which was the 52-time rate. That's what they were being billed.

I told Harold Peterfreund, the head of Future Motors, that by canceling I would have to charge him the 26-time rate, which would increase the cost of the ads he had run, the 50 or so ads that he had run so far, sufficiently that it would cost him less to run the additional ad or two and he would get in effect free ads by continuing to run. He refused.

Q Mr. Peterman, what was your salary in 1957 and 58 before you purchased any stock in Taxi Weekly?

A In 1957 it was under $6,000.

In 1958, which included part of a year when I was already a stockholder in Taxi Weekly, it was also under $6,000.

Q What functions were you performing at that time?

A I was running the operation. I was running the day-to-day functions and supervising the editorial content, going after the ads, administering. Everything that I was doing later on I was doing. I was the only one there to do these things.

MR. WENTZEL: Your Honor, at this time I would like to mark as an exhibit the letters of cancellation of subscriptions to Taxi Weekly. These have all been previously produced.

MR. NESSEN: Weren't these all stipulated to?

MR. WENTZEL: I want the originals.

MR. NESSEN: I thought these were all stipulated to and we were going to avoid this very thing.

MR. WENTZEL: I just want to get the original letters into the record.

THE COURT: He's got a right to put in the letters.

xxx (Plaintiffs' Exhibit 112 marked for identification.)

MR. WENTZEL: I offer them in evidence, your Honor.

THE COURT: I have no question about admitting those as long as Mr. Peterman would testify that those are the letters he received and I don't see any reason to stand around about them. Are those the letters that you received?

THE WITNESS: Yes, sir.

THE COURT: They are received.

xxx (Plaintiffs' Exhibit 112 for identification received in evidence.)

THE COURT: Anything else, Mr. Wentzel?

MR. WENTZEL: Yes, your Honor. I offered this morning Plaintiffs' Exhibit 23 which is a list of Metropolitan members, and Mr. Nessen wanted a chance to look at it, and if he has a problem with it, I have the original list that was produced.

MR. NESSEN: I have an undated document. I have no idea whether these were the members on any particular day. I have no date on it.

THE COURT: What date does that represent?

MR. WENTZEL: It's the 1964 membership. Here is the original as it was produced to us.

MR. NESSEN: If you just tell me, there is no problem. If you assure me that this has the names of all the members, fine.

THE COURT: Do you represent --

MR. NESSEN: We'll take it. Why don't we mark the original 23-A for identification so that if there is any problem, we can -- can we do that?

THE COURT: Fine.

xxx (Plaintiffs' Exhibit 23-A marked for identification.)

MR. DINKES: May I just see it to corroborate whether my client is not on that list?

THE COURT: I will take it subject to any correction that is necessary. Plaintiffs' Exhibits 23 and 23-A are both received in evidence.

xxx (Plaintiffs' Exhibits 23 and 23-A for identification received in evidence.)

MR. WENTZEL: May we approach the bench, your Honor.

THE COURT: Sure.

(Discussion at the bench off the record.)

THE COURT: Now you want to tell me about an offer of proof of transcripts of conversations.

MR. WENTZEL: Yes. The first is, I have marked as Exhibit 52 for identification the transcript of a conversation between Mr. Peterman and Sid Weisberger dated November 6, 1965 at an Amalgamated affair.

And as Exhibit 53 for identification a transcript of a conversation between Mr. Peterman and Mr. Turkisher dated January 17, 1966 at the offices of Taxi Weekly.

THE COURT: You are offering these transcripts?

MR. WENTZEL: Let me just finish this.

As Exhibit 54 for identification a transcript of a conversation between Mr. Peterman and Charles Levy dated June 16, 1966.

Now, I should probably have some questions of the witness just for a foundation that these are transcripts.

MR. NESSEN: No, let's have an offer of proof outside of the hearing of the jury.

MR. WENTZEL: Mr. Peterman will testify that with respect to Exhibit 52, that Mr. Weisberger was an employee of King Ford, that he met him on November 6, 1965 at an industry function and that they had the conversation that is contained in the transcript here, and Mr. Peterman recorded that conversation and made this transcript from the recording.

THE COURT: I don't think there is any question about that fact of the recording or the accuracy. That's never been a problem.

MR. NESSEN: I don't know about that one.

THE COURT: Please.

MR. WENTZEL: Mr. Peterman will testify that Mr. Turkisher, who at the time was a member of the executive committee of Metropolitan, came to his office on January 17, 1966 and held the conversation that is reflected in Exhibit 53, and Mr. Peterman recorded that conversation and made the transcript from that recording.

THE COURT: Okay.

MR. WENTZEL: Mr. Peterman will testify that on June 17, 1966 he had a conversation with Charles Levy who was a fleet owner, that he recorded that conversation, that --

THE COURT: That date being?

MR. WENTZEL: June 17, 1966.

THE COURT: Okay.

MR. WENTZEL: And that Exhibit 54 for identification is a transcript of the recording which he made of that conversation.

THE COURT: Are you offering to have Mr. Peterman testify as to those conversations or introduce the transcripts or both?

MR. WENTZEL: I would offer, your Honor, first of all I would like to play the tapes.

THE COURT: All right.

MR. WENTZEL: Secondly, if your Honor denies that request, I would like to introduce the transcripts in evidence.

Third, if your Honor denies that request, I would have Mr. Peterman testify as to contents of the transcripts, and fourth, if your Honor denies that request, I would mark particular passages and ask that those be read.

I haven't yet done the fourth one.

THE COURT: Now, as of right now I am denying, for the reasons that I gave as to the other transcripts, either the playing of the tapes, the introduction of the transcripts or the testimony about the whole conversation.

Obviously I doubt very much if I will have any change of ruling when you mark particular passages unless they are of a character that somehow would take them out of my ruling, but I wouldn't want to bar you if you want to show me the particular marked passages, I will certainly consider those, but that's all I can rule on right now.

MR. WENTZEL: Perhaps I could do that while Mr. Pratt is reading the next deposition.

THE COURT: Surely.

(Discussion off the record.)

THE COURT: Juror Number 6 has advised Mr. Sangara that he requests to be excused because of urgent business reasons at the end of the day today. Is there any objection to excusing him and putting in the alternate?

MR. WENTZEL: I have no objection.

MR. NESSEN: I hate always to excuse a juror for an alternate because I never can, I just have a feeling about that.

THE COURT: Is there any exception to this?

MR. NESSEN: I hate to admit it but I have no exception.

MR. DINKES: No objection.

MR. MC GRATH: No objection.

THE COURT: All right.

(In open court.)

THE COURT: Ladies and gentlemen, we are somewhat behind schedule and we will adjourn at 4:30. We will do whatever we can do between now and 4:30. Monday morning there will be, as I understand it, a little bit of deposition reading to finish up the plaintiffs' case. I don't think we can go past 4:30. And then the defense case, and then summations and charge and we'll do the best we can.

As I understand it, juror Number 6 has an urgent business problem and requests to be excused so at the end of the day, if you just keep your place until the end of the day, sir, but at the end of the day you will be excused and alternate Number 1 at the beginning of Monday morning will become juror Number 6.

Okay. All right. Now, I think Mr. Wentzel, do you have any further questions of Mr. Peterman?

MR. WENTZEL: No, I don't, your Honor.

THE COURT: Now, we need to wrap up any further cross of Mr. Peterman so there is nothing left of him. Mr. Dinkes, I think you wanted to go ahead.

MR. DINKES: Yes.

CROSS-EXAMINATION

BY MR. DINKES:

Q Mr. Peterman, just a few questions if you don't mind.

You mentioned Morris Marken an awful lot. He's dead, isn't he?

A I understand that.

Q And Henry Friedlander, you mentioned, and he is also dead?

A I understand that.

Q And my client, Nathan Levine, whom you haven't mentioned, is also dead?

A I understand that.

Q And you have conceded, have you not, that you have no recollection of ever having discussed any of the issues in this case with Nat Levine, haven't you conceded that, sir?

A I cannot recall whether I conceded that or not, but --

Q Well, you saw the --

THE COURT: Let's not -- if he has conceded it, you can refer to is. If you have got a real question, ask your question.

Q You saw the answers to the notice to admit that your attorneys gave me just last week, didn't you?

A I don't know if I saw that particular document.

Q Well, is it correct that you have no present recollection now of ever having discussed these matters with Nat Levine? Isn't that correct?

A I believe that is correct.

Q Mr. Peterman, you told us, I believe, that your father financed the first half purchase, helped finance that first half purchase from Mr. Wysinger for 15,000.

A I didn't quite word it that way.

Q Well, he put up collateral and you took a loan.

A That's right.

Q Is that the way you accomplished the second half as well, in the same manner?

A No. Part of the collateral I believe was my own, but it consisted of a loan from a bank against collateral.

Q And your father posted that?

A My father and/or my mother, and myself.

Q But nobody else?

A No.

Q Now, you told us also that -- and I believe one of the defendants' exhibits is a letter from Mr. Wysinger to your attorney or from Mr. Wysinger's attorneys to your attorney offering you some money for the purchase of your part of the business; is that right?

A That's right.

Q And then you told us you instructed your attorney to write his attorney back; is that right?

A That's right.

Q Do you have that letter?

A I saw it last night in my file. I don't have it with me today.

THE COURT: Don't start asking for documents. We could have done this hours ago. If you wanted a letter, you should have asked Mr. Wentzel.

MR. DINKES: I never heard it offered. I was just wondering if it exists.

THE WITNESS: It does and I saw it last night in my files.

THE COURT: We are not going to have discovery now.

MR. DINKES: I just have two or three more things.

Q You told us, Mr. Peterman, that when you first went to speak to Mr. Botwinick you were very surprised to find out you were having business problems with Mr. Wysinger; is that right?

A That's right.

Q Now you also know Mr. Wysinger had testified in this case at a deposition; is that right?

A Yes.

Q Were you present at the deposition when he testified?

A Yes.

Q And did you hear him say, Mr. Wysinger say, that in 1963, a year before you had any sort of trouble with the fleet owners, that you had gone so far as to go to a lawyer, the lawyer had his lawyer and your lawyer had drawn up papers, a contract for the purchase of his interest in the business, do you remember him saying that?

A I vaguely remember something.

Q And do you remember him also saying that in 1963 that the contract was completely written up, he was going to buy my interest in the stock and I changed my mind because of certain things that occurred. I told him when I came back on Monday morning I changed my mind. I didn't agree with what occurred, and what you had said over the weekend to Miss Graham who had been with me, that's Adele Graham, right, who had been with me for over 18 to 20 years, do you remember him saying that?

A If it's in the deposition, he said it.

Q Is it true?

A I don't recall all those particular facets of it.

Q Don't you recall that --

A Perhaps I misunderstood. Are you asking me whether he said that in his deposition or whether it was true in reality?

Q I want to know whether it's true in reality.

A Definitely not.

Q In other words Mr. Wysinger, you are now testifying under oath that Mr. Wysinger lied when he said that there had been a contract drawn between the attorneys for your purchase of his stock, is that what you are testifying to now?

A That's right.

Q And he also lied when he said that he wouldn't go ahead with the contract because you did certain things to annoy him about Miss Graham, you lied to him also about that;

is that right?

A That's right.

Q And you are saying now that there was no dispute at all between you and Mr. Wysinger dated at least back to 1963, you are saying that now, right?

A I am saying that as any two businessmen will have some differences of opinion we had some, and I am saying that there was no dispute to the point of dissolving a business or something like that.

Q He didn't say you were dissolving the business.

THE COURT: Please. If you want -- Mr. Wysinger's deposition can be read, so let's not argue about what Mr. Wysinger's deposition said.

Q I am saying Mr. Wysinger testified that you and he had actually gone to the bargaining table and made a deal for you to buy his stock out in 1963. You had gone to the lawyers, the lawyers had drawn up the papers and at the so-called last minute he refused to sign. Are you saying that that's a lie?

A I am saying that those facts as you related them have no basis in fact.

Q So it's a lie.

A (No response.)

THE COURT: Let's go on. Anything else?

MR. DINKES: No further questions.

THE COURT: I think we are finished with Mr. --

MR. MC GRATH: If I may, Judge, very briefly.

CROSS-EXAMINATION

BY MR. MC GRATH:

Q Mr. Peterman, did UTOG, the organization of owner drivers, have a subscription to your publication in June or July of 1964?

A Do you mean a single subscription or a bulk subscription?

Q Any subscriptions, single, bulk, anything, UTOG?

A They did not have a bulk subscription. They may possibly have gotten a single copy but I'm not sure.

Q At the very most they would have had a single copy; is that correct?

A Maybe several copies to different people.

Q Do you remember, sir?

A I have no recollection.

Q Did ITOC in June of 1964 or July of 1964 have one subscription to your publication?

A I'm not aware of their having any. I'm not aware that they had an address at that time.

Q That's not the question, sir.

THE COURT: They didn't have a subscription, right?

THE WITNESS: I just don't know. I don't know the names of everybody. There are thousands of names.

Q I am giving you one name, ITOC.

A I don't know.

Q Did UTOG take any ads in your publication in June or July of 1964?

A No.

Q Did ITOC take any ads in your publication in June or July or thereafter of 1964?

A I have no recollection of any but you have the bound volumes.

Q They are in evidence, Mr. Peterman.

A You can look them up but I just don't remember that.

Q And you mentioned Morris Marken. Is it your testimony to the members of the jury that the name of Morris Marken and his personality, and Morris Marken himself was anathema to a man among the fleet owners?

A There may have been one or two exceptions that were buddies of his bunt to every man but certainly to the vast block of them.

Q The vast block of the 82 or 90 fleet operators, Morris Marken was an enemy; is that correct?

A They seemed to consider him that way.

Q And he was an enemy in your opinion; isn't that correct?

THE COURT: If there is one thing that's clear in the record, it's what you are trying to labor now.

Q Just one final question. It's clear that everyone thought Morris Marken was an opponent of the fleet operators.

Isn't it true, Mr. Peterman, that in June of 1964 Mr. Marken represented the owner operators in the proceedings before the City Council in the City of New York?

A An attorney who I believe was employed by him. I don't think he was there personally.

Q Do you know whether there was reported in 1964, specifically June of 1964, that Mr. Marken met with the owner operators at his request and at their request and that there was a series of meetings and that thereafter it was reported in the UTOG Newscaster that Marken was representing the owner operators?

A By that you mean he personally was --

Q Marken, his interests --

THE COURT: Through an attorney, right?

A Yes.

MR. DINKES: Can we have the name of that attorney.

Q Do you know the name of the attorney?

A Well, I believe it was reported in my issue when he spoke at the City Council in June of '64, my issue covering that date. I believe June 4 was the Council meeting. My next issue after that I believe would have his name in it.

THE COURT: That can be read. It undoubtedly is in evidence. Mr. Dinkes wants it so he can find it and read it.

MR. MC GRATH: I offer now in evidence the June 1964 edition of the UTOG Newscaster bearing the headline "Report Given of Board, Marken Meetings to Set ITOC Actions Before and During Fare Hearings."

THE COURT: What is that next exhibit?

THE CLERK: BA.

xxx (Defendants' Exhibit BA for identification received in evidence.)

THE COURT: Anything else?

MR. MC GRATH: At this time I also offer in evidence all of the publications of the UTOG Newscaster for the years 1963 and 1964.

THE COURT: You get them together and we'll receive them.

MR. MC GRATH: We have, Judge. They are all separate.

Nothing further.

THE COURT: That concludes your examination.

Thank you, Mr. Peterman.

(Witness excused.)

THE COURT: We will adjourn now until ten o'clock Monday, and thank you, juror Number 6.

(The jury left the courtroom.)

(In the robing room.)

(Discussion off the record.)

(Adjourned to Monday, July 14, 1975, at ten o'clock.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------x

TAXI WEEKLY, INC., et ano,

Plaintiffs,

vs.

METROPOLITAN TAXICAB BOARD OF TRADE, INC., et al.,

Defendants.

-------------------------------x

Before:
HON. THOMAS P. GRIESA, D.J..
and a Jury

66 CIVIL 2827

New York, July 14,15,16,31, 1975

STENOGRAPHER'S MINUTES.

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TAXI WEEKLY, INC., et ano

vs. 66 Civ. 2827

METROPOLITAN TAXICAB BOARD
OF TRADE, INC., et al.

New York, New York
July 14, 1975 - 10 a.m.

(Trial resumed.)

(In the robing room, all counsel present.)

THE COURT: The record should show -- I guess it's not a terribly important matter -- that on Saturday my office telephoned both Casey, Lane & Mittendorf and Mr. Nessen's firm, and we were sent several of the exhibits in the case for which we are very appreciative.

One thing that I expected to get, and I am not sure that my request was all that clear, but what I want to talk about now is something we mentioned frequently and that is the stipulation about the cancellations.

I was particularly interested Saturday in trying to get, to button down the specific facts that are going to be in the record about the cancellations, and I never got those.

I just hope -- there is no problem about me not getting it Saturday, but I just hope they exist. I think we have got to make sure where we stand on that.

MR. WENTZEL: As I understand it, and these

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gentlemen can correct me, when Mr. Pratt and Mr. Turchin had verified the numbers involved, and apparently there is some open question as to labels to be put on the thing, you can see for yourself, and there is also a question as to what the numbers are to be compared with. It changes the percentages very, very slightly.

THE COURT: We have got two sheets here.

MR. WENTZEL: The one with the handwriting on reflects Mr. Nessen's.

MR. NESSEN: Your Honor, we are withdrawing from that entirely. In fact we are making a motion now that we be relieved -- where we will seek to be relieved of all stipulations in regard to the circulation of Taxi Weekly in view of the testimony on Friday about Taxi Age, and I would like to be heard on that after your Honor has looked at that.

THE COURT: Well, that's really another matter People canceled beginning July 14.

Now, I would like to know, if I were sitting on the jury, the facts about those cancellations, and in the record right now we have got all of those letters, and I think I would be interested in knowing, for instance, the total subscriptions taken out by the defendants.

Now maybe nobody wants to put that in but I might be interested in it.

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I would like to know who the members of the Metropolitan board were, and when they canceled, if they canceled.

Those are all things that we got curious about Saturday and we sat around and tried to get a minute showing the board and put the board list together with the correspondence, but again, it's a little vague on the present record, and maybe nobody wants to put it in. If they don't want to put it in, they don't want to put it in. It's all right with me.

But there were -- the letters, except for two letters refer to Taxi Weekly and not Taxi Age, so presumably it would be possible, even if we didn't get into Taxi Age at all, it would be possible to get the facts about the cancellations all out without any problem at all I would think.

MR. WENTZEL: A number of the ones that referred to Taxi Weekly may have been Taxi Age because everybody called it Taxi Weekly.

THE COURT: Okay. But look --

MR. NESSEN: That's why we are not stipulating here, your Honor. You look at the bottom part it says cancellations of Taxi Weekly, and I no more will stipulate to that any more on this record than I will concede liability.

THE COURT: In other words, you are not willing to stipulate any figures at all.

MR. NESSEN: No, your Honor. And I am about to ask to be relieved of certain concessions that I made --

THE COURT: Let's see those letters.

MR. PRATT: These are the cancellation letters, your Honor.

THE COURT: Where is Exhibit 112?

MR. NESSEN: In view of Mr. Wentzel's statement that he is not sure if people were referring to Taxi Age, I don't know what this exercise is going to do for us.

THE COURT: Well, look, this exercise is intended to continue the work we started.

Now, as far as getting to the bottom of the subscription figures, it seems to me the defendants could have done it in the nine years just as well as having it revealed by the plaintiffs. And I was misled in the beginning of the trial into stating some figures to the jury and I think I was -- I don't know why it took until the fifth day of trial to have someone from the defense side start reading from an affidavit that breaks the figures down.

MR. NESSEN: May I be heard on that?

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THE COURT: Nobody corrected -- when I read that stipulation to the jury, nobody from either side corrected me, so it isn't a matter of laying the blame on one particular party entirely. I think we have got to work together and get this job done and not take forever doing it.

MR. NESSEN: I agree, your Honor. May I be heard on this?

THE COURT: Yes.

MR. NESSEN: Your Honor, I make a motion to be relieved of certain stipulations and to strike certain exhibits in view of the statement that came out about Taxi Age on Friday.

THE COURT: When did you first know about Taxi Age?

MR. NESSEN: Your Honor, I didn't know about Taxi Age personally until I received on 5:15 p.m. on July 1, and does the clerk -- if the clerk were here, I would like to just offer some material for identification.

Would you mark a marked up proposal of stipulations of fact, Taxi Weekly, Inc. versus MTBT, as our next Exhibit BB.

xxx (Defendants' Exhibit BB marked for identification.)

MR. NESSEN: I hadn't heard personally of Taxi Age until I looked at this stipulation. As you remember, your

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Honor, I told you that I would go red line and try to make concessions here.

THE COURT: You read Mr. Wysinger's deposition, hadn't you?

MR. NESSEN: No, I didn't personally read Mr. Wysinger's deposition, your Honor. But let me -- I have read almost every other deposition but I did not read Mr. Wysinger, I did not read Mr. Zeff's until the other day. And you understand, your Honor, I haven't been in this case from the beginning.

THE COURT: When did you get in the case?

MR. NESSEN: January of '74, your Honor.

I did look through and I did get further discovery and I do look at books and records, but I will come back in a minute. May I just go through this presentation very quickly.

I looked at paragraph 2 and it said Taxi Weekly. Sometimes in some cases called Taxi Age.

I looked at it and, your Honor, I say that I assumed that this was an old name used by old Mr. Wysinger, and, in fact, because I didn't understand it, I tried, if your Honor will look, at writing what I thought was more accurate: Taxi Weekly or its predecessor. And then I crossed that out and tried Taxi Weekly under that name or a predecessor name. And then I went on.

And then I decided, your Honor, that we didn't have enough time to fiddle around with names. What I would do is red line it, I made a copy of this, what I would do is red line what I could agree to and what not to, and if plaintiffs had a problem --

THE COURT: We are going to be here all morning at this. Let's get to the point.

MR. NESSEN: I want to make a record here and it will just take a minute. I know what I want to do.

And, your Honor, you will see from the red lined edition that I am now marking of the same copy, BC for identification, that I eliminated sometimes in some cases called Taxi Age because I didn't know what it was.

In fact, when I got into the case --

THE COURT: Also, I read the deposition of Mr. Wysinger. Mr. Wysinger does say that Taxi Age was an old name for Taxi Weekly, so all right. Go ahead.

MR. NESSEN: I had a discussion with Mr. Turchin yesterday, or the day before yesterday --

xxx (Defendants' Exhibit BC marked for identification.)

MR. NESSEN: -- and Mr. Turchin said that he had seen in cancellation letters Taxi Age, and he assumed that

that was an old name for the newspaper, and he let it go at that. He never informed me about it. I don't know whether he informed Judge Owen at the time, but in any event, he didn't -- he had no comment on two other than we thought it was an old name.

Now the fact of the matter is, your Honor, I have looked through the records and went to Casey, Lane & Mittendorf and I sent up an accountant. This was after all discovery. We had informal discovery because I wasn't satisfied that we had really gotten what we should get.

THE COURT: When did you do this?

MR. NESSEN: I did that in November or before then, around that time.

Your Honor, I have here what the accountants and I -- I had asked last week, as a matter of fact, the accountants to send over to me, and I will mark as an exhibit, the next exhibit, what the accountants have told me they looked at, and which I remember looking at myself, and I also looked at it -- it is not a bulk circulation book of Taxi Weekly but I was told at the time that there were no general ledgers.

Now, I remember there actually is a conflict between the accountants and me. I thought I had seen general ledgers for 1963 back. The accountants apparently

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didn't. But what was clear was there was no general ledger for '64 forward. There was no -- there was nothing to verify circulation presented to me. And there was not one document that I saw in the books or records that referred to Taxi Age, nor did we ever get a copy of it nor have I ever seen a masthead of it. I tell you that I was just shocked to learn on Friday.

Now, I would like, your Honor, to show you and mark as an exhibit.

xxx (Defendants' Exhibit BD marked for identification.)

MR. NESSEN: I would also like to show you, your Honor, a piece of paper from an accountant's worksheet that I had given to the accountant, what I wanted them to look at, and I think that might be helpful in showing just where we stand.

xxx (Defendants' Exhibit BE marked for identification.)

MR. NESSEN: Now, not for one moment, your Honor, and I am sorry to say that, would I have conceded all the concessions about facts and figures in this record if I knew that this newspaper was going out as Taxi Age.

THE COURT: You don't have to labor that.

MR. NESSEN: All right, I think you understand it.

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Your Honor, what I do want to do is move particularly to amend our concession that the factual statment Number 1 which your Honor read to the jury, particularly where it says on page 2, your Honor, the newspaper Taxi Weekly was read widely, I don't concede that for one minute any more.

In the first half of 1964 prior to a circulation decline about there will be evidence Taxi Weekly circulation averaged 11,000 per issue, I surely don't concede that, and I would withdraw from that.

And the next paragraph about two-thirds or more of the weekly circulation was to fleet owners, et cetera, I respectfully move to be allowed to withdraw from that stipulation.

Similarly on page 3, your Honor, the circulation revenue of Taxi Weekly for the fiscal year ending March 31 was 43,236 and the next paragraph the revenues, the advertising revenues -- I can't read the writing here, your Honor, but it mentions 64,070, I respectfully ask to be relieved of that stipulation.

THE COURT: Okay.

Now Mr. McGrath, you are the one who read the figures from those affidavits of mailing or whatever they are called last Friday.

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MR. MC GRATH: Affidavit of ownership.

THE COURT: Affidavit of ownership. Now when did you first focus on that?

MR. MC GRATH: When the expert started to testify about the circulation and at first I couldn't find it, and I only found it on the second day of his testimony.

MR. WENTZEL: Those bound volumes have been in this case and the defendants have had copies of them and we have had them available for them for years in the case, your Honor.

MR. MC GRATH: That doesn't make any difference.

THE COURT: Now, look, I want to say this: I got kind of heated when the thing first came up, and I sustained the objection to the question which Mr. Wentzel was asking Mr. Kobak about what he would feel if he knew that the balance of the subscriptions were Taxi Age, and I sustained that objection, and I directed that there be no reference to Taxi Age.

Now, the problem arises, and Mr. Wentzel pointed it out at that time but I didn't really focus, we do have the figures which were given to the jury and which any party would be entitled to on the present record to refer to as a stipulation, although I don't suppose the jury remembers those figures at the present moment. Maybe they

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do, maybe they don't. But it is in the record, and the parties would be entitled, unless there was a change, to refer to everything that I read as a stipulation, and the stipulation that I read referred to total circulation of 11,000.

Now the figures brought out by Mr. McGrath in his cross of Mr. Kobak read from those exhibits showed substantially less as far as Taxi Weekly.

Now, this is just a subject we have got to, without getting heated, we have got to resolve, figure out what to do about, so it will be fair to all sides.

MR. NESSEN: Your Honor, may I complete just quickly the exhibits that I would like stricken just for the record.

THE COURT: All right.

MR. NESSEN: I am sorry to interrupt you but I think it best this way.

I would like to have stricken from the record, and I respectfully move to strike on the basis that my understanding of figures and the authenticity of the books and records of Taxi Weekly were different at the time than it is now, I move to strike Defendants' L through R.

THE COURT: What are they?

MR. NESSEN: They are the exhibits, the Taxi

Weekly, Inc. financial statements for 1966. From 1960 through 1966.

Insofar as there are schedules in each of those financial statements referring to the income and breakdown of income --

THE COURT: You better have your exhibits.

MR. NESSEN: We have them here, your Honor. I thought it would be quicker not to -- let me just illustrate, your Honor, what I have in mind.

THE COURT: I don't know why if anybody had a very difficult matter to bring up we couldn't have called an earlier meeting. We have got the jury sitting the e. I could have been down here at 8:30 or any other time.

MR. NESSEN: I really don't like to call judges on weekends.

THE COURT: I was in the office all day Saturday.

MR. NESSEN: I know you had other things to do.

THE COURT: What was I doing but this case?

MR. NESSEN: Nothing, I don't think. I'm sorry, your Honor.

Exhibit B, you see, for example, in L, there is a column that says Taxi Weekly and it shows gross advertising income, and it goes right down the line. We move to strike that whole reference in each of these exhibits.

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THE COURT: I don't think we will strike exhibits because there may be factors going to the weight, but I can't rewrite the exhibits, and neither can you, and none of us want to and we are not going to strike columns.

MR. NESSEN: May I just finish the presentation.

I move to withdraw X-1, Defendants' X-1, Defendants' Y --

THE COURT: What is X-1?

MR. NESSEN: X-1 is the circulation breakdown schedule, your Honor, that was attached to Answers to Interrogatories and front page income from Taxi Weekly, and in fact we offered it into evidence.

THE COURT: Okay. That's something we'll have to consider. What else?

MR. NESSEN: Exhibit Y. Accounts receivable. I move to strike that on the ground --

THE COURT: What is it?

MR. NESSEN: I believe, your Honor, it's pages from the accounts receivable book. It should be in my folder on exhibits for summation. This is from a black notebook that says subscriptions list, and I frankly don't know whether it's Taxi Age or Taxi Weekly that we got or the whole subscription book, whether it refers to bulk subscription book, Taxi Age or Taxi Weekly.

THE COURT: In other words, this is an exhibit of yours.

MR. NESSEN: Yes.

Now I move to strike, your Honor, 20 and 29, 42, 43 through 49, 104, 111 and 112.

20 is just another way of the plaintiffs got up the circulation for Taxi Weekly. It's supposedly more helpful to show fiscal years. I think it's probably a little bit more confusing than Exhibit Y, but it's virtually the same thing.

And 29 is also part of Y, and it's just the advertising schedules and for the same ground, I don't know whether it was advertised in Taxi Weekly or Taxi Age.

I call your attention, your Honor, to the Complaint in this action --

THE COURT: I have already read the Complaint.

MR. NESSEN: And paragraph 3.

THE COURT: Let's hear from Mr. Wentzel.

MR. WENTZEL: Your Honor, in the eight or nine years that this case has been going on nobody has ever raised the question as to the identity, a common identity of Taxi Age and Taxi Weekly. The defendants who were subscribers to the newspaper obviously knew what it was, and it is and was, as Mr. Peterman said the other day, an identical newspaper.

Apparently for historical reasons its name Taxi Age was carried on from the early thirties and that masthead was used as the newspaper was sent out to some subscribers. The books and records, as Mr. Nessen has just stated, of Taxi Weekly regarded it as one newspaper. The advertising was placed in one newspaper. It was called Taxi Weekly.

The bound volumes which were kept were the ones showing the Taxi Weekly masthead. It was simply because it was known throughout the trade as Taxi Weekly, known those issues that bore the masthead of Taxi Age.

Mr. Peterman over the weekend dug up, he had one anniversary edition of the Taxi Age with a minute. It contains testimonial letters from the mayor and so forth, and it shows letters of congratulations to Taxi Weekly on the masthead of Taxi Age, clearly showing that everybody regarded it as one paper.

Now as far as Mr. Nessen's position, I don't believe anybody in the case regarded this as being of any significance. When we were preparing the stipulation, Mr. Peterman pointed out to me that some issues had gone out with this masthead so we prepared the stipulation to be correct.

THE COURT: Well, look, I --

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MR. NESSEN: I will concede, is it the notion that these newspapers have always been the same in every respect except for the heading Taxi Age as opposed to Taxi Weekly?

MR. PETERMAN: That's right, except for the changes consistent with that.

MR. NESSEN: What are the changes consistent with that?

MR. PETERMAN: This one is in better shape. On top of each page it says Taxi Age, this box down here says Taxi Age and it's not entered as second-class mail so it doesn't have the line saying that.

THE COURT: What mailing was this entered as?

MR. PETERMAN: It was mailed as third-class.

THE COURT: Now look, let me say this, the thing that took me aback on Friday was this, that I didn't know, sitting there, whether the paper was the same or wasn't the same. I didn't know what significance the different title had or didn't have, and I felt it was awfully late to get into that.

I assumed that there must be a reason for people doing things. I don't assume that somebody just slips another masthead in, that the guy at the press just slips another masthead in for no reason. But I don't know what the reason is and how much of a reason, and what it means

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to the case. It was a completely new point to me.

Now, probably the best way to handle this is to simply let it come out in the case for both sides any way that anybody needs to have it come out.

If Mr. Peterman, after being -- let me just go back. If it would distort the case and give an unrealistic picture to the jury to only talk about Taxi Weekly and Taxi Weekly's subscription, and if that would distort the case, well that's one good reason for not doing it that way because we don't really want the case distorted.

On the other hand, the thing that was floating through my mind Friday was how to cope with possible surprise to me and the defense counsel and maybe even to the plaintiffs' counsel.

MR. WENTZEL: To me as well. I didn't know this issue was going to be raised.

THE COURT: I didn't know the significance of it.

Just so we can get through this, what about -- let me just propose something and I don't know whether this will meet with approval or not.

First of all, I will reverse the ruling of Friday in which I said that I would exclude all reference to Taxi Age. That would mean that both the plaintiffs' side and the defense side would make any reference that was appropriate

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to the case.

Second, I think, without knowing the significance -- I mean, right now we have had a conference on the record -- we have had a conference in here, but the record isn't -- the facts about Taxi Age aren't really on the record in a formal manner, and it seems to me that in fairness, that the stipulation about the 11,000 subscriptions to Taxi Weekly, that should be withdrawn and let the facts be developed.

The stipulation about the circulation revenues of Taxi Weekly should be withdrawn and let the facts develop. Maybe the facts are very simple, that the 11,000 is just the combination of the two papers.

But right now I don't -- at least as stated, literally stated, I was wrong in reading that to the jury, and so those two phases of my stipulation would be withdrawn and I would put it in a way that inflamed the jury and indicate that it was all false or anything, and it's just a matter to be proved, the exact situation.

Now as far as this withdrawal of exhibits, I would not strike the financial statements from the record. They say what they say and you can't rewrite them.

As far as any materials prepared by the plaintiff for the litigation that may be on a somewhat different footing.

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But original records, they say what they say.

Now, the things that stand on the last footing, materials prepared by the plaintiff for the litigation, that X-1 is -- X-1 stands on that. That was prepared in answer to interrogatories. And you introduced it.

MR. NESSEN: On the assumption that it was --

THE COURT: And you want to withdraw that as far as circulation. I think I would have to let you do that.

What else is there?

MR. NESSEN: All these exhibits. Your Honor, why can't we, if I may suggest it, why don't you hold all of this in abeyance. I know the jury is out there and I know you are concerned and I am concerned.

THE COURT: The ground rules -- what I would like to do -- the only thing that I want to consider as far as exhibits is the possibility that you should have a right to withdraw as far as agreeing to let plaintiffs' summaries come in so that we could reserve on.

Now let me just hear from you on that. You get my proposal in general?

MR. WENTZEL: Yes, your Honor. Once again these summaries are taken from the books and records of Taxi Weekly, and they represent the totals of the newspapers, circulation, whatever the various documents are. As the

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books and records of Taxi Weekly do, so the summaries include all the newspapers, whether it went out on the masthead of Taxi Weekly or the masthead of Taxi Age.

THE COURT: But let's just take it one point at a time.

Do you agree to instruct the jury that I am withdrawing -- let me just ask both of you. Let's take it point by point.

Do all sides agree to instruct the jury now that I have reconsidered my ruling of Friday? I will permit both sides to refer to Taxi Weekly and the Taxi Age for any appropriate reason. Is that agreeable?

MR. WENTZEL: Well, it is agreeable. I am disturbed that this entire matter was raised at such a late point in the case, and it seems to me it may be being blown all out of proportion in a manner that is prejudicial.

I mean, after all, if the defendants had told us that they wouldn't agree to circulation figures, honestly I would have started the case off and proved them in the normal course of events and it would come in in a logical sequence. Now we are here at the very end of the plaintiffs' case, I had hoped to close within a half hour and finish within a half hour this morning, and I am concerned that

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this whole matter, which, as I said, it's never been raised before in the case, and we didn't know it was going to be raised, and it's blown out of proportion and I am very concerned about that. I am concerned to the point that I wonder whether I shouldn't move for a mistrial.

MR. NESSEN: Please do.

THE COURT: Just a second. I get your point, but, on the other hand, the Complaint in this action, the proposed stipulation, everything certainly that I had seen, referred to Taxi Weekly as a newspaper.

Now, those things were incorrect as literally stated, and they were your submissions.

Now, what you are saying to me is, although literally incorrect, in substance it doesn't make any difference. That may be true, and I think you are entitled to prove that, and I will do my best to instruct the jury that they are to consider your submissions along that line and evaluate whether it makes any difference or not. That's a question for them.

But I must say that I can't put the onus of raising the point on the defendants because the plaintiffs' submissions were inaccurate, and it would have been far better to say that the subscriptions of Taxi Weekly were X thousand, the subscriptions of Taxi Age were X thousand, but the two papers were in essence identical except the masthead.

When somebody puts out a paper under two different mastheads, I don't assume there was no reason and I don't assume it made no difference, and it will have to be proved to me that it makes no difference. What difference it makes I don't know.

But I am just interested -- I think like in any factual matter you try to get the facts accurate and then you let the chips fall were they may as far as the significance, and that's the way we will proceed.

I get your point. I don't want the jury to get this thing out of perspective any more than you do, and I think I will be able to instruct them so that we can get back on the track, and it will not be taken out of perspective. It's a matter that has come up and has to be cleared up, that's all.

MR. NESSEN: The facts will speak for themselves, your Honor. I think you are quite right.

THE COURT: Mr. Wentzel has stated his point, and I ask the defense counsel if they are agreeable to having the matter submitted as I stated.

MR. NESSEN: Your Honor is free to say as far as I am concerned that there will be evidence on Taxi Age and that both sides --

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THE COURT: Mr. Dinkes?

MR. DINKES: Yes.

THE COURT: Mr. McGrath?

MR. MC GRATH: Yes.

THE COURT: And in line with that, I will, in as measured a way as possible, state to the jury that the facts about the 11,000 circulation, the facts about the circulation revenues of Taxi Weekly, and the advertising revenues which I stated to them, those facts are no longer stipulated and will be subjects of proof.

And as far as the exhibits, I just don't want to hold up on that.

MR. NESSEN: No, we'll do that at the next recess for you, your Honor, exactly what those are. We move to strike them all but we'll help you.

Your Honor, I would like to have these copies of Taxi Age marked for identification if I may.

MR. WENTZEL: Yes.

MR. NESSEN: Maybe that will save some time.

MR. MC GRATH: Mr. Wentzel, are there any other copies of Taxi Age that are available?

MR. WENTZEL: I don't know.

Isn't it the testimony that every single week --

THE COURT: You just get these marked outside and

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get the jury.

xxx (Defendants' Exhibit BF marked for identification.)

(In open court, jury present.)

THE COURT: Ladies and gentlemen, I'm sorry to keep you waiting but I would like to discuss with you the matter which came up Friday afternoon, that is, the matter of the Taxi Age which was -- there was some indication, I don't know how far it got in the evidence and I don't think it got very far, but apparently the plaintiffs contend that some of the papers that were circulated back at the time we are talking about went out under the heading Taxi Age instead of Taxi Weekly.

Now, at that time, you recall, I had a discussion with the lawyers at the bench, and decided rather quickly that I couldn't have references to Taxi Age coming out, we were trying to finish up the trial, and so forth.

Now, I have reconsidered that, and I have discussed with counsel what to do about that, and it's agreed on all sides that it would be a distortion of the case, really, a distortion of the factual picture, if we didn't bring out, or if I didn't permit bringing out whatever facts there are about Taxi Age.

It's part of the picture, and we want you to get

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as much as you can of the whole picture, and so I will reverse that ruling and both sides are free to refer in any appropriate way to Taxi Age or Taxi Weekly as the case may be.

Now I think juries are good at keeping things in perspective, and the fact that this came up somewhat suddenly, as it did, that's not anything -- well, I don't know whether it's a moment or not, but I think you will hear the contentions of the plaintiffs that it really didn't make any difference, it doesn't make any substantial difference in the case, the defendants have their views, and I think the best thing to do is for you to just listen carefully to the evidence on the points and hear what the contentions of the parties are and you evaluate the situation sensibly and in your best judgment, so we will proceed on that basis now.

I guess there is a -- you wish, Mr. Nessen, to recall Mr. Peterman?

MR. NESSEN: Yes.

THE COURT: Do you wish to call him?

MR. WENTZEL: I do, your Honor.

THE COURT: All right, you go ahead, Mr. Wentzel. Mr. Wentzel will recall Mr. Peterman for further direct examination.

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SEYMOUR PETERMAN, recalled as a witness by the plaintiffs, having previously been duly sworn, testified further as follows:

FURTHER DIRECT EXAMINATION

BY MR. WENTZEL:

Q Mr. Peterman, what was Taxi Age?

A Taxi Age was originally a newspaper that was the first name of the original newspaper as I understand it that was published by Mr. Wysinger.

When I entered the business, the name was being kept alive by Mr. Wysinger as the name of part of the issues of Taxi Weekly that were run off. The two newspapers were the exact same newspaper but part of the issues that were run off were run under the name of Taxi Age and part were run off under the name Taxi Weekly.

We usually referred to the paper as Taxi Weekly, but it included Taxi Age which was exactly the same. The ads were the same, the copy was the same. The only difference was the name and a manner of distribution.

THE COURT: Let me interrupt you. I forgot to tell the jury one thing.

Now, if you recall, I read to you at the beginning of the case a kind of introductory stipulation and I don't imagine you remember the specifics of that, but the specifics are in the record and could be referred to by either party unless changed.

One of the things that I read to you was, in the first half of 1964 prior to a circulation decline about which there will be evidence, Taxi Weekly's circulation averaged 11,000 per issue.

The defendants have moved to withdraw from that stipulation and I am granting that motion so that is no longer a stipulated fact. The figures about circulation will have to be proved by the parties.

There was a further statement about two-thirds or more of the weekly circulation was to fleet owners who would pay for these subscriptions and then distribute them to their drivers. Again, that stipulation is withdrawn.

There was a statement about as follows: The last fiscal year before the circulation declined about which there will be evidence -- I'm sorry. Referring to the fiscal year ending March 31, 1964 I stated as a stipulated fact as follows:

The circulation of revenues of Taxi Weekly for the fiscal year ending March 31, 1964 were $43,236. The advertising revenues for this fiscal year were $64,070.

That stipulation as to those figures has been withdrawn and the defendants have moved to withdraw the stipulation and I have granted that motion. Again these figures are matters of proof for you.

All right, go ahead, Mr. Wentzel.

Q Mr. Peterman, in what respects did Taxi Age, the physical newspaper itself, differ from Taxi Weekly?

A The masthead was different. The title on each successive page was different. There was a little box on page 2 which has the name on it. That was different.

And it has the titles of each of the people working there. The title and everything remain the same but the names Taxi Age and Taxi Weekly were different.

On Taxi Weekly it had a little legend in that box "Entered as Second-Class Mail," and I refer to just those copies that appear under Taxi Weekly, and that did not appear in Taxi Age.

Q Let me show you some copies of a newspaper which has been marked Defendants' Exhibit BF for identification, and I ask you whether those are some of the copies of the newspaper with the Taxi Age masthead on them.

A Yes, they are.

Q For what date are those?

A There is an issue dated October 1st, 1962. There is an issue dated June 15, 1964.

The third issue in here is not Taxi Age; it is the corresponding issue of Taxi Weekly.

THE COURT: For what date?

THE WITNESS: June 15, '64, the same as the date of one of the Taxi Age issues.

THE COURT: Can we have those marked?

MR. NESSEN: One of them has already been marked but I think we better separate those.

THE WITNESS: There's a third copy, sir.

(Handing.)

THE COURT: Are they all one exhibit now?

MR. NESSEN: Yes, sir.

THE COURT: What is it?

MR. NESSEN: It's Defendants' Exhibit BF, your Honor.

THE COURT: Is anybody offering that?

MR. NESSEN: There are three copies here.

THE COURT: That's right. He mentioned that.

MR. WENTZEL: Yes, I would like to offer it in evidence.

THE COURT: I will receive BF.

MR. MC GRATH: May we be heard on that, your Honor. May we approach the bench.

THE COURT: No, I am not going to have any conference on that.

MR. MC GRATH: May I have a brief voir dire on it?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MC GRATH:

Q Mr. Peterman, do you have in your possession or in the possession of your attorneys any other copies of Taxi Age other than those you are offering now?

A Mr. Nessen has a copy.

Q Those that you produced today. Do you have any other copies available to us other than the copies that you are offering now?

MR. NESSEN: There is a third one here.

THE COURT: Please. Can we just have an answer to that question.

A I couldn't, in searching over the weekend, I couldn't find any but these three copies. It may very well be that there are other copies in existence that I do have, but I couldn't find any others because I did not keep Taxi Age separately.

MR. MC GRATH: I would be very reluctant to say something now.

THE COURT: No, you can argue to the jury or you can cross-examine.

MR. MC GRATH: There was a statement made before, your Honor, in chambers on Friday --

THE COURT: Please. Is there one other that hasn't been marked?

MR. NESSEN: Yes, there is, your Honor.

THE COURT: I think we better get that marked. What is the date of that, please?

MR. WENTZEL: This one is Taxi Age dated February 17, 1960.

MR. NESSEN: Your Honor, I want to object to these temporarily, too, in view of the witness' answers on the voir dire, and I would like to ask one voir dire question if I may.

THE COURT: Let's get this third copy marked as an exhibit.

xxx (Plaintiffs' Exhibit 114 marked for identification.)

xxx (Defendants' Exhibit BF for identification received in evidence.)

THE COURT: What is your question on voir dire?

VOIR DIRE EXAMINATION

BY MR. NESSEN:

Q Didn't you several minutes ago tell all of us here, in fact, that you went through a bulk, a lot of these editions and pulled out several for us of Taxi Age? Didn't you say that about a half hour ago?

A I said I went through my files. I did not say what you say I said.

THE COURT: All right.

DIRECT EXAMINATION CONT'D

BY MR. WENTZEL:

Q Mr. Peterman, was it your practice to retain bound volumes of the newspaper?

A Yes.

Q Did you retain bound volumes of both Taxi Age and Taxi Weekly?

A No. There was no purpose to that. It was just Taxi Weekly.

Q Why didn't you keep Taxi Age?

A It was the same paper. There was no purpose to keeping it.

MR. WENTZEL: Now your Honor, I would just like to read a couple of these comments on the first page of Defendants' Exhibit BF which is in evidence to the jury.

This is an edition which bears the headline "Our Thirtieth Anniversary," and as you can see, there are pictures of various leading figures including Governor Rockefeller and Mayor Wagner on the first page, and quotations from them, and from Governor Rockefeller it states:

"It affords me much pleasure to send my cordial greetings to the staff and personnel of Taxi Weekly on this occasion of the thirtieth anniversary of Taxi Weekly."

"It is my sincere pleasure to extend greetings to the staff." That was by the mayor.

THE COURT: All the statements that were made this morning are on the record, so if anybody wants to get them, they can get them.

Are you offering Exhibit 114, that third copy?

MR. WENTZEL: Yes.

THE COURT: All right, I will receive that.

MR. MC GRATH: Objection, please.

THE COURT: Your objection is overruled.

xxx (Plaintiffs' Exhibit 114 for identification received in evidence.)

BY MR. WENTZEL:

Q Now Mr. Peterman, we had some testimony last week in the case concerning advertisers. Now when an advertiser such as you described last week, you mentioned Chrysler and some others, advertise in the newspaper, which one was he advertising in?

A The papers were the same, the advertisers were the same, the ads were the same. He was in both.

Q Now, in keeping the books and records of Taxi Weekly, did you separate the monthly magazine circulation figures from the newspaper circulation figures?

A Yes. They were different publications.

Q Did you break down the circulation figures in the books and records for the Taxi Age, the newspaper which bore the heading Taxi Age, as opposed to the one that bore Taxi Weekly?

A No, we did not because they were the same paper.

Q And what was the circulation of the newspaper combined, Taxi Weekly and Taxi Age?

A For the first half of 1964 it was a little bit over 11,000.

Q Annually, do you mean?

A Per week average over the six-month period for both combined.

Whenever I referred to any of these statistics, it was always in reference to both together because they were the same paper, and the name Taxi Weekly was used.

Q Well, why was this Taxi Age continued on?

A Well, it had sentimental value to Mr. Wysinger. It was the paper that he had founded, I understood, Taxi Age.

Q Now, in Exhibit BF, which is dated October 1, 1962, it bears the statement "Volume 30, Number 40." What does that refer to?

A Well, that goes back to the first issue of the paper, when it was published, which I believe at that time -- it was before my time -- it was called just Taxi Age. But we kept the same volume numbers for both publications. In other words, a given issue for a given date of the publication, whether it had a masthead of Taxi Weekly or Taxi Age, both had the same volume number initially.

Q What does the volume number refer to?

A Well, that's the number of years.

Q A separate volume each year?

A That's right. And the issue number is the issue in that year.

Q Now, in the financial statements of Taxi Weekly, where it gives the circulation revenues for Taxi Weekly, does that comprise the circulation revenue of both Taxi Weekly and Taxi Age?

A Yes, it does.

Q Is that also true of the advertising revenues that appear in the financial statements?

A Yes, it is true.

Q I show you a copy of Defendants' Exhibit X-1, Mr. Peterman, and you note that that exhibit bears monthly circulation and advertising revenues for a number of years for Taxi Weekly; is that correct?

A Yes.

Q Does that comprise the circulation of Taxi Weekly under that name and the newspaper under the name of Taxi Age?

A Yes.

Q Combined?

A That's right. The figures are for the combined papers.

Q Now, have you had occasion to calculate the revenues, the subscription revenues which were lost through the cancellations of your bulk subscriptions which began starting about the middle of July 1964?

A Yes.

Q I believe you testified that those subscriptions, cancellations started about July 14; is that correct?

A Yes, on July 14th.

Q And how many fleets canceled on that day?

A Eight.

Q What was their total combined billing rate per year?

A $9,427.60.

Q Have you made a calculation of what that represented to your total subscription revenue at that time?

A Yes, 22.9 percent.

Q Did you receive additional cancellations through the following week into, say, July 14th, 15th and 16th?

A Yes.

Q Now, as of July 16th, how many fleets canceled?

A Seventeen had canceled during those three days.

Q And what was the combined billing for those 17 fleets?

A $15,386.80.

THE COURT: How many fleets through July 16?

THE WITNESS: Seventeen.

THE COURT: What percent?

THE WITNESS: 37.4.

THE COURT: Go ahead, Mr. Wentzel.

Q Just so we are clear on this: The 15,000 you gave was the total of the 17 that had canceled including the ones that canceled on the 14th, 15th and 16th?

A That's right; yes, sir.

Q How about through the first week after July 14th, how many had canceled after one week?

A Through the 20th, 22 had canceled.

Q What was that combined billing rate of the 22?

A $17,628 per year.

Q What percent of the newspaper's circulation revenue at that time did that amount to?

A 42.9 percent.

Q By the end of the month of July of 1964, how many fleets had canceled?

A Twenty-three.

THE COURT: How many as of the 31st?

THE WITNESS: Twenty-three.

THE COURT: Total?

THE WITNESS: The dollars were $18,148; the percentage was 44.1 percent.

Q Going all the way down through September 11, 1964, how many fleets had canceled by that time?

A Thirty-one.

Q What was the combined billing rate?

A $24,351.60 per year.

Q What percentage of the circulation revenue did that represent?

A 59.2 percent.

Q Now, in the first six months after July 14, 1964, how many fleet cancellations were there?

A Sixty-five.

THE COURT: Is that as of January 15?

THE WITNESS: Approximately six months. I believe that would be February.

THE COURT: January 15 would be literally it, but what do you mean to tell us?

THE WITNESS: There were 65 cancellations within about half a year.

Q What percentage of your fleet subscribers did those 65 cancellations represent?

A Practically all of them. I would say the newspapers represented were well over 90 percent.

THE COURT: Over 90 percent of your subscription revenues?

THE WITNESS: That's right.

MR. DINKES: If your Honor please, I don't think that's the answer to the question. I think it's over 90 percent of the fleets that had been received.

THE COURT: Well, we have given the percentages heretofore of circulation revenue. Now you are talking about some different percentage now?

MR. WENTZEL: The last question, your Honor, was addressed really to the number of subscribers of fleets that he had subscribing.

THE COURT: So it's over 90 percent of fleets subscribing.

THE WITNESS: No. The answer there would be somewhat lower.

Approximately 65 over the denominator would be about 72 or 75.

THE COURT: So you started out with 72 or 75 fleet subscribers.

THE WITNESS: That's right.

THE COURT: And 65 out of 72 or 75 -- fleet subscribers.

THE WITNESS: I am not sure what the percentage is.

THE COURT: All right.

Q Now, of the total circulation of the newspaper -- when I say the newspaper I mean whether it was called Taxi Weekly or Taxi Age, of that total circulation, how much of that circulation prior to July 1964 was to fleets?

THE COURT: Are you talking about revenues or numbers of copies?

MR. WENTZEL: Circulation copies.

A It was approximately 7,000. A little over 7,000 copies.

THE COURT: To what, to fleets?

THE WITNESS: That's right.

Q And the total circulation was what?

A A little over 11,000 during the first half of '64.

Q Now, do you have any figures showing the amounts which had been paid by the individual cancelers who began canceling on July 14th? In other words, you gave us the total of the eight who canceled on July 14.

A Yes.

Q Do you have the breakdown of those eight?

A Excuse me. In looking at my papers, I lost exactly what the question was, the last question.

Q The question was, do you have the breakdown of what the billing was for each of the eight fleet operators who canceled the subscriptions on July 14th.

A (No response.)

Q Let me show you this document. Is the handwriting on that document yours?

A Yes.

Q What is the source of this information you have been giving us about the combined billing rates of these eight and then 17 and so forth? Where did you get that figure from?

A We maintained a book that was a combination of sales ledger and accounts receivable ledger.

Q Just describe what that book has in it.

A It has the name of each of the fleet accounts that was a bulk subscriber. It has a page and it could be several pages because it goes back over a period of time, that list each week that they bought copies and the billing for that week.

THE COURT: Wait a minute. Go over that again.

(Record read.)

A (Continuing) And most of them were billed out monthly so the amount per week would generally be totaled at the end of the month, and a monthly bill would be sent out.

Then there was a ledger page, and I'm not too familiar with bookkeeping, but I believe the amount billed was entered on one side and the amounts received were entered on another, and the two were supposed to balance.

Q Now, with respect to the eight fleets that canceled on July 14, would you identify them and give the billing rate for each one of those?

A Yes. Ann Operating Corporation, Mr. Gerald Naren. And the billing rate per year was $780.

Cornell Maintenance Corporation, the billing rate per year was --

THE COURT: Who was the individual there?

THE WITNESS: A gentleman by the name of Philip Rosenbloom.

A (Continuing) The billing rate was $520 per year.

Metro Systems Corporation, Jack Plotsky, $2,532.40.

Columbia Operating Company, Isidore Suchman, $780.

Chase Maintenance Corporation, Morris Heit,

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$1,980.40.

Jofan Maintenance Corporation, Leonard Schaffran, $520.

Ann Service Corporation, Milton Marks, $780.

Butler Maintenance Corporation, Leon Murstein, $1,606.80.

And I believe that covers it.

THE COURT: Now, what do you have for -- let's see, there are two defendants not referred to, Morris Lefkowitz who canceled by letter of July 15.

THE WITNESS: He canceled the next day and it was M & S Maintenance Corporation, Morris Lefkowitz, $728.

THE COURT: How about Nathan Levine who canceled in November?

MR. WENTZEL: Do you need to look that one up?

THE WITNESS: I have the weekly amount per fleet. I don't have the yearly amount.

THE COURT: What is the weekly amount per fleet?

THE WITNESS: 57th Street was $15, Sixth Street was 7.50 and Yange was 7.50 making a total of $30 per week times 52 would be, I believe, $1560.

THE COURT: All right. Anything else?

Q Mr. Peterman, what was the price of the individual copies to the fleet subscribers?

A Ten cents per copy.

MR. WENTZEL: That's all I have, your Honor.

THE COURT: All right, Mr. Nessen.

CROSS-EXAMINATION

BY MR. NESSEN:

Q Mr. Peterman, you said that the delivery of Taxi Age and of Taxi Weekly were different.

A That's right.

Q Would you explain that to the jury.

A Well, Taxi Weekly was entered as a second-class publication and it was mailed second-class.

Taxi Age was delivered either third-class or parcel post, and originally I believe there had also been some hand deliveries by bundles.

Q What do you mean by originally?

A When I first started.

Q Was that true in 1964?

A I don't think so.

Q Well, you recall getting Mr. Rosenbloom's cancellation on July 14th, or thereabouts?

A Yes.

Q And do you remember him saying "Effective at once, please discontinue making bulk deliveries to our garage of Taxi Age"?

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A If that's what the letter says, that's what it says.

Q Were you making deliveries to his garage in July of 1964?

A I personally wasn't.

Q Was Taxi Weekly, sir?

A Yes.

Q And isn't it a fact that you were making deliveries to a great many garages of Taxi Weekly, or Taxi Age?

A Yes. Either through the mail or some other way. I don't know.

Q Deliveries, sir, by physically bringing them down there?

A I don't think this was being done in '64.

Q Well, it was being done for this one man.

A I don't think the letter says that.

Q Effective at once, please discontinue making bulk deliveries to our garage of Taxi Age. Are you saying that that meant mailing?

A It could very well have.

Q You don't know any more?

A No, I don't.

Q It's too long ago?

A I don't recall that we were making any deliveries by hand in '64, and I doubt that we were.

Q You were doing it all by mail?

A I believe so; yes.

Q And that's Taxi Age and Taxi Weekly; is that true?

A I believe so; yes, sir.

Q Now, how did you mail the subscriptions of the newspaper to owner drivers in, say, the first half of 1964?

A In the mail.

Q And was that true in '63?

A Yes.

Q 1962?

A Yes.

Q And were they getting Taxi Age or were they getting Taxi Weekly?

A They were getting both.

Q How much of both, do you have any idea?

A No.

Q Weren't most of these bulk deliveries of your newspaper Taxi Age?

A (No response.)

Q To the fleets.

A I don't think so.

Q Well, can you give us an estimate of how many were printed as Taxi Age and how many were printed as Taxi Weekly?

A I don't know for sure but I believe it was something like half and half.

Q Half and half?

A Something like that. I have no way of knowing that because we didn't keep any records of that.

Q But it was 50/50?

A I'm saying somewhere in that area.

Q You didn't keep any records; is that so?

A Not for our billing or anything like that.

Q Well, where did you get the figures that you gave us this morning just a while ago about circulation?

A I said I didn't keep any records by the type of paper. I certainly kept totals.

Q What circulation records did you keep?

A The revenues is in the total amount.

Q Yesterday Mr. Kobak told us that you gave him exact figures -- or the last time we met -- on that, just how much were published each year; do you recall that?

A I gave him an average weekly amount for a given year.

Q Now, what documents did you use to get up those figures?

A I had those figures.

Q Where did you have them?

A I had them going back to the sixties when I originally compiled the figures.

Q Going back to the sixties?

A Yes.

Q What did you use to compile them, Mr. Peterman?

A At this time or then?

Q Then.

A The press runs.

Q You don't have those press runs now, do you know?

A I don't have any record of the press runs except in the checkbooks.

Q What does that mean? I'm not sure I understand you.

A When a check was written each week to the printer, the check was based upon the number of pages. There was so much paid per page and the number of copies. So much paid per copy.

Q But you don't have anything that we could look at to verify the circulation and see what was Taxi Age and what was Taxi Weekly; is that true?

A Not broken down between them, but for the total, yes.

Q Well, how do you do that, by taking the checkbook?

A Yes. It was figured out in the stub. So much for each of eight pages, or twelve pages, so much per copy, and it was written down right in the stubs of the checkbooks and in many cases right on the check.

Q Now, it's a fact that all copies of both Taxi Weekly and Taxi Age were sent through the mails except that some few copies were picked up at your office; is that correct? In 1964.

A I believe that is so.

Q And the owner operators, sir, how many copies of Taxi Age or Taxi Weekly did they get per week in 1964, the first half?

A Approximately 4,000.

Q Approximately 4,000.

A Yes.

Q And was the bulk of that that was going to them given to them free?

A I believe most of that circulation was originally paid but by then had expired.

Q You are saying that in 1964 it was free, the bulk of it?

A I am saying most of it had expired.

Q And most of it had expired in 1963, too, hadn't it?

A I believe so.

Q Do you remember Mr. Kobak testifying on Friday as follows:

"How did it go to the owner operators?

"Answer: Primarily it was sent to them free."

Did you give him that information?

A Yes.

Q Now, what did they get, Taxi Age or Taxi Weekly?

A I believe they got Taxi Age but some of them got Taxi Weekly.

Q How many got Taxi Weekly?

A I don't know. I believe it was a minor portion got Taxi Weekly and a major portion got Taxi Age.

Q And Taxi Agent went third-class?

A That's right.

Q What is the difference? You better tell the jury the difference between third-class and second-class. First of all, which is cheaper?

A I believe that second-class was cheaper. I don't know what it is today.

Q And it's speedier, too, isn't it?

THE COURT: Second-class is cheaper?

MR. NESSEN: Cheaper.

A I don't know that it's speedier. I don't know that at all.

Q Isn't second-class mail -- didn't you tell us that when you first got on the stand here that you put it in the mail on Thursday, or whatever it was, so that they would get it quickly? Do you remember that testimony about getting it through the mail and getting it into their hands? It was a weekly magazine, wasn't it?

A It was a weekly newspaper. But we were at the mercy of the post office on delivery.

Q I understand that we are all at the mercy of the post office, but is it your understanding that second-class and- third-class mail get to people at the same time?

A It was my understanding that mail mailed in any given day could be received in New York City by its recipient the next day or the next week --

Q On second-class mail?

A On either class.

Q You say there is no difference between second- and third-class mail?

A I'm not saying that at all. What I did say is that the time of receipt varied tremendously in both classes.

Q What is your understanding? Which is speedier, which is supposed to be much speedier?

A I had no understanding that either was speedier. The only understanding I had was that they were both non-priority mail.

Q You have no idea that second-class mail is supposed to go at a faster clip than third-class mail; is that what you are telling us?

A That's right.

Q Now, did you tell Mr. Kobak about Taxi Age and that 50 percent, or close to 50 percent of Taxi Weekly went out under the name of Taxi Age?

A I told him there was a split run, that part of it went out one day and part the other. As I said before, I don't know whether it was 50 percent but it was somewhere in that neighborhood.

Q You say you told Mr. Kobak that?

A I'm saying that he was told at one time that part of it went out as Taxi Age and part went out as Taxi Weekly. I don't know whether I told him the name Taxi Age specifically but I said there was another name and part of it went out as that, but we called it all, in our records, everything combined, everything was under the name of Taxi Weekly as far as our record keeping went.

Q Are you saying that Mr. Kobak wasn't surprised on Friday about the name Taxi Age?

A He may not have been familiar with the particular name. This is what I'm saying.

Q And you are saying he wasn't surprised at the whole notion that there was a large chunk of this newspaper that went out under a different name? Is that what you are saying?

A I'm saying what I told him. I'm not talking about his emotional reaction.

Q I understand. You told him all about Taxi Age, how its history and so forth; is that correct?

A I mentioned it briefly in one sentence, as a part of one sentence because it was completely unimportant. It had no meaning.

Q No meaning whatsoever?

A That's right.

Q Is that what you are telling the jury?

A That's right.

Q Except sentimental reasons?

A (No response.)

Q Is that what you are telling the jury?

A And there was a difference in the manner of distribution.

Q Was that important?

A I don't know whether it's important or not.

Q Isn't it a fact, a very key, Mr. Peterman?

A I don't consider it a key.

Q You didn't at the time?

A No.

Q You said, in your Answers to Interrogatories, the newspaper went out of business in 1966.

A That's right.

Q That was Taxi Weekly and Taxi Age; is that correct?

A And Taxicab Industry Auto Rental News.

Q When you said the newspaper you meant Taxi Age and Taxi Weekly went out of business in 1966?

A That's right.

Q Now, between April 1964 and 1966 can you break down how much went out in Taxi Age and how much went out in Taxi Weekly?

A No, I can't.

Q About 50/50?

A I have no idea because after the cancellation --

THE COURT: Can we have the question answered.

I tell you, what do you mean how much went out?

MR. NESSEN: How many copies. I'm sorry. The breakdown.

Q You said the breakdown before 1964 was about 50/50, or roughly that.

A Roughly that.

Q And now the owner drivers were largely getting Taxi Age; is that correct?

A Yes, through the spring of '64, yes.

Q And so the fleet owners were canceling; isn't that correct?

A Yes.

Q And they were the ones largely getting Taxi Age or Taxi Weekly?

A I don't know what the majority of their circulation was.

Q Well, really, then, what happens is, after the cancellations, a larger percentage go out under Taxi Age than they do under Taxi Weekly?

A I don't know that it was maintained the same way as it was before the cancellations because my office was in an uproar as a result of this conspiracy.

MR. DINKES: I move to strike that, your Honor.

MR. NESSEN: That's all right. I would rather leave this in the record.

Q What I am saying is that in any event, Taxi Age and Taxi Weekly went out '64, '65 and then '66 you closed it down; is that correct?

A I don't know how long Taxi Age was continued. I just don't know.

Q Didn't you tell us a minute ago that Taxi Age continued with Taxi Weekly until 1966?

A It continued into the time after the conspiracy started but I don't know how long it continued.

Q Well, you got the line of my questioning, didn't you, Mr. Peterman?

A No.

Q And the fact of the matter is that this Taxi Age, with all its sentiment for Mr. Wysinger, was kept going by you after July 1964; isn't that correct? And right through 1966?

A I don't recall that. I don't know. I don't know when it was stopped if it was stopped. I had many important things then to consider.

Q Wasn't one of the key things for your newspaper, or for any newspaper, to keep the second-class mail rates? Isn't that a fact?

A It was of some importance, yes.

Q It's a key fact?

A The key fact was getting out of the conspiracy and being able to survive.

MR. MC GRATH: I move to strike.

MR. NESSEN: I understand. No. That's all right. The replies are replies.

Q Now, you say that these two newspapers were exactly the same save for changing Taxi Weekly to Taxi Age on the top. And on this heading -- they are really the same except what you do is strike Taxi Age and put Taxi Weekly and then on the next page you strike Taxi Weekly and you run off Taxi Age.

I will put that where the jury can see it.

THE COURT: Let's take a short break here.

(Recess.)

BY MR. NESSEN:

Q Mr. Peterman, do you mean to tell us in this courtroom that for sentimental sake in 1963 and the first half of 1964 you sent out about half your newspapers under the name of Taxi Age?

A (No response.)

Q Is that right?

A I am saying that the name was kept alive for sentimental reasons by Mr. Wysinger. This was done before my time.

Q I am talking at your time.

A And it continued.

Q I want the jury to know that in 1964 it is your testimony that for sentimental reasons that newspaper went out in the name, half of it went out in the name of Taxi Age; is that your testimony?

A My testimony was that the name Taxi Age was kept alive.

THE COURT: Look, you are not answering the question. Read the question and I want an answer.

(Record read.)

A No.

Q What is the truth?

A Well, the truth is I didn't do it for sentimental reasons.

Q What reasons did you do it for?

A I just kept the system that was there.

Q Now, you kept the system that was there in 1965, too, didn't you?

THE COURT: Just so we can make a little progress. What was the reason why you kept that system going?

THE WITNESS: That is the way it had been, and I saw no reason to change it.

THE COURT: Why had it been?

THE WITNESS: I'm really not sure.

THE COURT: You mean you don't know why this practice of having half the copies or approximately half the copies Taxi Weekly and half Taxi Age, you don't know why that was done either before you came or after you came?

THE WITNESS: I had heard at one time that Wysinger was considering the possibility of having two different publications and wanted to keep the name Taxi Age alive, but I don't know that that was the real possibility because it didn't make much sense to me.

Q It doesn't make any sense at all, does it, because everything in the Taxi Age speaks of Taxi Weekly in the print, it doesn't make any sense at all, does it?

A Usually in the paper, when there was something like a subscription coupon, or a box that said about mailing in the classified, or something, we used the word "Taxi." In other words, not "Taxi Age" or "Taxi Weekly" so that what appeared in both papers was the word "Taxi, mail to Taxi at 161 West 54th Street," so that we tried to overcome that problem in that way.

We also tried to say "this newspaper," and not say the words "Taxi Weekly," but when we received a message, say from Governor Rockefeller addressed to Taxi Weekly, we couldn't very well change that wording when it appeared in Taxi Weekly and change that to Taxi Age.

Q It was truly Taxi Weekly that had this name; isn't that right, and was generally known?

A (No response.)

Q You pick up any of these issues and it mentions Taxi Weekly in the front pages in all the stories.

A I don't think it was a general practice. I think the general practice was to say "this newspaper."

Q And you are saying that there was a possibility you would start your own newspaper under Taxi Age and that may have been a reason to keep it going?

A I said that this, at one point in a discussion at sometime, but I never lent it much credence. I didn't think it was something that made much sense.

THE COURT: You mean the possibility of Mr. Wysinger splitting off and starting his own separate paper?

THE WITNESS: No.

THE COURT: What was the possibility referred to?

THE WITNESS: To have for some purpose -- and it was never spelled out -- to have another newspaper, either perhaps circulating to a bigger area, not just New York City, or for some different purpose so that he wanted to keep the name alive. He didn't want it to lie dormant and just die.

Q He wanted to keep it alive by having over 50 percent of the newspaper go out under the name Taxi Age; is that right?

A I didn't say over 50 percent because I don't know.

Q Close to 50 percent?

A I don't know.

Q I thought you said roughly 50 percent.

A I said, and you said over.

Q No, I mean roughly 50 percent. Let's talk about that and let's see if I can move on.

Now, you know that second-class mail, a newspaper, can qualify for what we call newspaper treatment, don't you?

A Yes.

Q And would you tell the jury what newspaper treatment second-class mail means?

A It means priority delivery. I tried to get it and I couldn't get it.

Q You were trying to get it; is that right?

A Yes, and they told me that they gave that just to general circulation or big publications.

Q All right. Now, it is a fact that second-class mail is a lot cheaper, you know that.

A I don't know that it was a lot. It was cheaper.

Q Okay, Now --

MR. NESSEN: Your Honor, I would like to hand out to the jury a photostatic page of Defendants' --

THE COURT: Is it in evidence?

MR. NESSEN: Yes -- AX from Taxi Weekly of Monday, October 14, 1963.

Would you mind? It's an affidavit of postal --

it appeared in the newspaper. And then I'm going to read it with the witness so that we can follow what we are saying.

THE COURT: This is Taxi Weekly of October 14?

MR. NESSEN: Yes.

THE COURT: It's a part of AX?

MR. NESSEN: Yes.

THE COURT: All right, it's okay to go ahead and do that.

Q Now Mr. Peterman, you understand that for second-class mailing, that each year, and then at certain quarters, you had to put in an affidavit and to print it in your newspaper. In fact, it was printed in Taxi Weekly, oh, every October, the second week in October, and also went out in Taxi Age in the second week in October, the same affidavit.

A I don't know if it was printed in Taxi Age. If it was printed, it shouldn't have been. I don't think it --

Q You struck it?

A I think so. Because it had no bearing on Taxi Age.

Q Now, did you tell Mr. Kobak that you had 8,000 paid subscribers and 3,000, slightly over 3,000 went out free?

A Yes.

Q And that's the truth, isn't it?

A Yes.

Q Now, I would like to read to you, on the bottom of the page, where it says "Paid Circulation. Average number of copies each issue during preceding trial months," speaking of 1963, "to term subscribers by mail, carrier delivery" or by any other means, 5,600; is that right? 5,601. In total number of print it was 6,010. That's of Taxi Weekly, isn't it?

A Alone, yes, sir.

Q Alone?

A Yes, sir.

Q So for the purposes of this affidavit, you are telling the jury that you didn't consider Taxi Weekly and Taxi Age the same, did you?

A We were instructed by the post office to consider them separately.

Q Is that what you are telling us, that the post office told you to put it this way?

A Yes.

Q Who at the post office?

A I don't know his name now.

Q Did you speak to him?

A In the second-class section.

Q What did he look like?

A I have no idea.

Q How many times did you speak to him?

A I have no idea.

Q Did you ever speak to him?

A I, at one time, or more than one time, did speak to people at the post office.

Q I mean this person that told you to do, to write up, to consider Taxi Age separate from Taxi Weekly.

A I have no idea, but this was what the post office instructed.

THE COURT: The question was, this person in the second-class section who said to consider Taxi Weekly and Taxi Age separately, was this someone that you spoke to and he told that to you or did he tell it to somebody else in your organization?

THE WITNESS: I'm not positive. I believe it may have been to me. But it also may have been at other times to other people.

Q Well, now, it says "Pre-distribution including samples by mail carrier delivery or by other means, 326."

THE COURT: The figures you read I didn't get. I don't have a copy of that thing.

MR. NESSEN: I am sorry, your Honor. Free distribution by mail.

THE COURT: Let's start back. What are the --

MR. NESSEN: The print run is on the top, your Honor, 6,100.

And then to term subscribers by mail carrier delivery --

THE COURT: Just don't read so fast, please.

MR. NESSEN: I'm sorry.

THE COURT: Print run, 6,010. And then the amount referred to as follows: To term subscribers by mail, carrier delivery and other means.

MR. NESSEN: 5,601, your Honor.

THE COURT: And that's subscribers?

MR. NESSEN: Paid subscribers.

THE COURT: And then free distribution.

MR. NESSEN: By any means.

THE COURT: 326. And then total distribution, 5927.

Okay. I think I have got the figures now. Go ahead.

BY MR. NESSEN:

Q How did you calculate 326 went to free?

A This was given to me by the circulation department.

Q Who was your circulation department?

A Whoever was working there at the time. I don't know who it was.

Q And you believed that to be true; is that a fact?

A Yes. Among the Taxi Weekly part of the rent.

Q And the rest of the free Taxi Age you are now saying that about 2,700 went out free of Taxi Age?

A Whatever the balance was.

THE COURT: Wait a minute. Where do we get that 2,700?

MR. NESSEN: Your Honor, there was testimony a while back that Mr. Kobak was told that 8,000 was paid and 3,000 was free, so that I assume if 326, roughly, 2,700 of Taxi Age went out for nothing.

Q Is that right?

A If those are the figures.

THE COURT: In other words, you are taking the 8,000 and subtracting -- go through that again. I'm sorry.

Q Friday the testimony of Mr. Kobak was that there was 8,000 paid, 3,000 unpaid of Taxi Weekly.

A That's right.

MR. NESSEN: And the witness here has said that he told him that and that's true.

Now the witness is saying that 326 of that free subscription went out of Taxi Weekly, and the balance, which is roughly 2,700, I suppose, went out under the name of

Taxi Age free.

THE COURT: Would that be right?

THE WITNESS: I don't have the figures in front of me.

THE COURT: Well, anyway, that would be the subtraction. Go ahead, Mr. Nessen.

Q Now, could you tell the jury your understanding of the priority for second-class mail in terms of a ratio between paid and unpaid?

A (No response.)

Q Did you have any in the 1960's?

A Any what?

Q Understanding in order to qualify for second-class mail, for that privilege, that you had to keep a certain ratio of paid and unpaid, a certain ratio.

A I believe there was some ratio at that time.

Q And that was required, wasn't it?

A I believe so.

Q Otherwise you lose your second-class mailing privileges.

A (No response.)

Q Isn't that a fact?

A I don't know that you would lose it.

Q Well, in order to get the cheaper rate, and whatever treatment second-class get in distinction from third-class, you had to keep a certain ratio of paid to unpaid.

A (No response.)

Q Isn't that right?

A Would you repeat the question, please.

(Question read.)

A It was my understanding that there was a ratio, but it was also my understanding that the second-class permit was rarely if ever suspended for a publication.

Q You discussed this with someone, didn't you?

A This was my understanding.

Q You discussed it with someone.

A Discussed what?

Q Discussed the fact that you had to keep a ratio with someone.

A I somewhere over the years became acquainted with that fact.

Q Through a lawyer?

A No.

Q Through that fellow you say you spoke to at the second-class mailing --

A I'm not sure but somewhere over the years I became aware that there was a ratio.

Q Isn't it a fact that Taxi Age was maintained and kept to put a fraud on the post office department? Isn't that a fact?

A It is absolutely not a fact.

Q Well, now, Taxi Age didn't have second-class mailing privileges; isn't that so?

A That's right.

Q And you don't add the freebees that you were giving Taxi Age to Taxi Weekly; isn't that so?

A It was specifically not to be done. This was my understanding.

Q Yet when we come into this court, you want to say that Taxi Weekly and Taxi Age are the same thing.

A It was the same newspaper.

Q It was. Did you tell that to the post office department?

A Yes.

Q In this affidavit?

A It wasn't asked in that affidavit.

Q Well, didn't they ask you how many copies of your newspaper went out?

A The fact of the two different mastheads was explained to them and what they requested was followed.

Q Who explained it?

THE COURT: Was what?

THE WITNESS: Was followed.

Q Did you explain it to someone?

A I had some kind of discussion with somebody at the post office about that particular point. And other people in my organization may have, I believe did have.

Q Mr. Wysinger whom you say was never there, too?

A He or somebody in his employ because the same system was there when I first started.

Q And the same system was there after Mr. Wysinger left, too; isn't that a fact?

A I don't know exactly what happened in that regard because Taxi Age, as I said, was, I believe, continued for sometime but I am not sure exactly when I dropped it if I did.

Q Well --

A It was unimportant and really immaterial.

Q I'm sorry, when did you first think of bringing this Anti-Trust suit, Mr. Peterman?

A I don't recall.

Q Wasn't it in the summer of 1964?

A I don't know. I knew something was being done to me, yes.

Q Did you start bringing the suit in the summer of

1964?

A I don't know that I specifically thought of bringing a suit at that time. I really just don't know that.

Q And you know in Anti-Trust suits there are treble damages and the Court will treble the damages?

MR. WENTZEL: Objection, your Honor. Darn it. Your Honor, we had a ruling on that before this trial started.

MR. NESSEN: No, we had no ruling on that at all.

MR. WENTZEL: That's the most improper statement I have ever heard in a courtroom.

MR. NESSEN: That is not. This witness has said that he had probably contemplated bringing a suit in 1964, and I am entitled to know what was in that witness' mind. I beg your pardon.

MR. WENTZEL: Your Honor, I ask that Mr. Nessen be instructed not to continue that line in accordance with your Honor's ruling before the trial.

THE COURT: Well, I did rule before the trial and I think you should have mentioned this to me, Mr. Nessen.

MR. NESSEN: I'm sorry, your Honor, I thought -- I'm sorry, your Honor, I think that where there is a question of evaluation of this business when he bought it, and I think I am entitled to explore fully when he says that he bought damaged damaged goods, that he in fact was buying a lawsuit and what he thought about it. I am terribly sorry. I think I am entitled to it.

THE COURT: I don't really think we have to have reference to it, but as long as it's come up I think that again the jury are intelligent people so that it can put these things in perspective.

Under the Anti-Trust laws an amount, if there is liability, an amount of actual loss it is trebled and that has a certain law enforcement purpose. But for the sake of the jury, the jury is not to consider that.

What Mr. Wentzel is concerned with, and it's a legitimate concern, is that there might be an emotional reaction on the part of the jury and they might, if there was a legitimate amount of damages, say the paper was worth a certain amount, and that Mr. Peterman was, had lost that, that the jury might worry and reduce that because they were worried about the treble.

Now that's the kind of thing that I think you won't get into and you are intelligent people and you are going to follow the instructions, and if and when you get to the question of damages, you are going to assess the actual loss and it's up to me under the statute to figure out what the judgment will be, so I don't think --

MR. NESSEN: I won't pursue the line.

MR. WENTZEL: Your Honor, I think you also should point out to the jury, as long as the question has been raised, that there are a number of defendants in this action who had made the claim that the treble damages did not apply to them.

THE COURT: Okay.

MR. NESSEN: Those who are dead.

THE COURT: Well, as a matter of law it's out of your cognizance and I think we understand each other.

MR. NESSEN: I'm sorry, your Honor. I really didn't think -- I think it's proper but I will accept the ruling.

Q Now, to get back to this question of Taxi Age, did you, after 1964, contemplate publishing a newspaper under the name of Taxi Age?

A I don't think I contemplated that.

Q I mean a separate newspaper from Taxi Weekly.

A I don't think I consciously contemplated that I was going to do it, but I didn't rule out, you know, the remote possibility that the name would have some use.

Q I thought you said a minute ago, or a half hour ago, that that idea was far-fetched when you spoke of it in terms of Mr. Wysinger.

A I couldn't see any application for it at the time it was mentioned. I did not rule out the possibility that there might come a time when having that name would be advantageous, and the sales agreement between Wysinger and myself, I believe, included that thing, that name.

Q Now, in terms of the fleet owners, are you telling us that Taxi Age was not delivered to garages, to fleet owners in large quantities? Is that your testimony?

A No.

Q What was delivered at the Hack Bureau, Taxi Age or Taxi Weekly?

A I'm not certain but I tend to believe it was Taxi Weekly.

Q Excuse me?

A I tend to believe it was Taxi Weekly.

Q But you are not certain?

A No, I'm not a hundred percent certain.

Q Why do you tend to believe that it was Taxi Weekly?

A It's just my recollection of having seen those copies several times.

Q Mr. Peterman, I showed you one letter that talked about delivery to the garage. Let me show you another letter and see Cordi Garage Corporation. This is reading from Plaintiffs' Exhibit 112.

A Yes.

Q Doesn't that refresh your recollection that, indeed, a large number, the largest number of Taxi Weekly as opposed to Taxi Age was delivered to garages of the fleet owners in 1964?

THE COURT: Do you mean delivered by hand or by second-class mail?

MR. NESSEN: By hand, your Honor.

A It does not in any way.

Q Do you know Harry Schwartzman?

A If I may read this, it says we wish to discontinue your bulk delivery to our garage. Thank you.

Q Does that refresh your recollection?

A This doesn't say how the delivery was made. It doesn't refresh my recollection in any way.

Q Who is Harry Schwartzback?

A He worked for Taxi Weekly at one time.

Q And wasn't he just a fellow who picked up the stuff and delivered it to the garages?

A He did do that at times, yes, sir.

Q Wasn't that his only job?

A No.

Q What else did he do?

A He was a full-time employee.

Q And he would take his car or truck or whatever it is and deliver Taxi Weekly to get it out fast; isn't that correct?

A He would make deliveries, yes.

Q And was he in your employ in 1964?

A No, he was not.

Q When did he start working for you?

A I'm not positive but it was in the early sixties.

THE COURT: Is that the letter that refers to that?

MR. NESSEN: Yes.

(Handing.)

THE COURT: Wait a minute now. Okay, this is a letter from Cordi Garage Corporation, July 20, 1964.

"Dear Sir: We wish to discontinue your bulk delivery to our garage. Thank you. Cordi Garage, Joe Dunn, president."

Was Joe Dunn a fleet owner, a garage owner or what?

THE WITNESS: He was known to me as a man connected with the taxicab industry. I don't know whether he owned it or was managing it, but it wasn't just -- he wasn't just a garage owner. He was a fleet owner, or a manager.

THE COURT: And this other man, Schwartzman --

MR. MC GRATH: Schwartzback, your Honor.

THE COURT: Schwartzback. I got a little lost.

Was he at one time an employee of Taxi Weekly?

THE WITNESS: Yes.

THE COURT: And when did he stop being an employee?

THE WITNESS: I am not sure but I know he was not an employee in '64 or '63.

Q Who was he replaced by?

A I don't recall.

THE COURT: And was he a delivery man?

THE WITNESS: He also made deliveries at one time.

Q Who replaced him?

A I don't recall.

Q Was it a man or a woman?

A I think it was a man.

Q What was his name?

A I don't recall.

Q Well you told us on direct examination, way back a week ago, that there were four employees in Taxi Weekly.

A There were four positions, and four employees generally filled those positions.

Q Where did Schwartzback fit in, where was he, at right tackle or what?

A He was one of the employees.

Q Which sluff?

A In circulation.

Q And who took his place?

A I don't recall his name.

Q Who was circulation's runner in 1964?

A In '64?

Q Yes.

A It was a woman by the name of Krasner. Beatrice Krasner. There were several people I believe in between the two.

MR. NESSEN: Your witness, Mr. McGrath.

THE COURT: Anything else?

MR. DINKES: Just a couple of questions.

CROSS-EXAMINATION

BY MR. DINKES:

Q By January of '65, approximately how much of the 7,000 that were distributed to the fleets, how much had that been reduced to?

A I don't know what the number would be.

Q Didn't you testify about 90 percent of your circulation to the fleets had been reduced as of January. January 15, 1965?

A I said within approximately six months.

THE COURT: Well, that's about six months.

Q Well, let's take February of 1965, by February 1 of 1965, approximately how much had that 7,000 figure been reduced to, of fleet distribution?

A I think somewhere around 90 percent.

Q That would be about 6300, nine times seven?

A Yes.

Q So you were down to about 700 distribution to the fleet each week; is that about right?

A Yes.

Q And did you continue after your reduction, did you continue to give away the free ones to the owner drivers? The same free ones, the 3,000 or so free ones which you had been giving away in 1963 and 4 and so forth?

A I believe the expirees were kept on.

THE COURT: You are talking about the free distribution, right?

THE WITNESS: Yes. They had expired.

Q And in addition to that you had about a thousand owner drivers or various other people that paid for their weekly editions; is that right?

A I don't know what the amount was as of that date but --

Q Well, it had been around 4,000, a year earlier, right, the beginning of '64 it had been about 4,000 to other than fleet distribution; is that about right, of which 3,000 was free and a thousand was paid, approximately?

A That's right.

Q So did that thousand continue on or was there some reduction or did that stay about the same?

A I don't know whether it increased or decreased or stayed the same because time had passed.

Q What is your best recollection?

A I don't recall.

Q Well, assuming for a moment it stayed the same, at about a thousand, was there any other circulation in February of '75 of either Taxi Age or Taxi Weekly other than 700 a week to fleets, 3,000 a week free and a thousand paid? Was there any other circulation?

A I don't recall. I don't recall.

Q Excuse me?

A I don't recall any.

Q So would it be a fair statement to say that by February of 1975 -- '65, excuse me -- the vast majority of the circulation was free?

A Yes.

MR. DINKES: That's all.

CROSS-EXAMINATION

BY MR. MC GRATH:

Q To follow up on Mr. Dinkes' statement, do you recall executing the affidavit in October of 1965 which would have related to the preceding 12 months, which would have been nine months in '65 and three months in '64? Do you recall signing and publishing that affidavit on October 11 of 1965, sir?

A I don't recall it but I assume I did it.

MR. MC GRATH: I ask that this be marked. This is the affidavit on page 4 of the October 11, 1965 Taxi Weekly.

THE COURT: Is this part of something that is in evidence now?

MR. MC GRATH: No, it is not in evidence.

THE COURT: All right, the next defendants' exhibit.

xxx (Defendants' Exhibit BG marked for identification.)

MR. MC GRATH: I will offer it at this time.

THE COURT: I will receive it.

MR. NESSEN: May I see it, please?

(Pause.)

xxx (Defendants' Exhibit BG for identification received in evidence.)

Q And I believe that your last answer to Mr. Dinkes was that until 1965, after February of 1965, that the vast majority of Taxi Weekly, your publication, was circulated free of charge.

A That's right.

THE COURT: He said that.

Q I read now from the affidavit, the bottom of the affidavit.

"I certify that the statements made by me above are correct and complete. Signature of editor, publisher, business manager or owner, Les Peterman.

"A. Total number of copies printed: Average number of copies each issue during the preceding 12 months: 4,690. Total paid circulation: 4,156. Free distribution: 431."

THE COURT: These are the averages.

MR. MC GRATH: That's right, Judge.

THE COURT: And what about the -- do they have figures for the issue nearest --

MR. MC GRATH: I will read that now.

"Total number of copies single issue nearest to filing date: 4500. Total paid circulation, single issue nearest filing date: 4,028. Total free distribution, single issue nearest the filing date: 352."

Q Now Mr. Peterman, the statements that you made in this affidavit, are they true, or are the statements that you just made in answer to the questions by Mr. Dinkes true?

A The statements in that affidavit were not true.

Q Were not true?

A That's right.

Q You lied when you signed this affidavit and filed it with the United States Postal Service, then called the U.S. Postal Department?

A The statements were not true.

Q I go back with you to 1964, in October of 1964 when you signed and filed an affidavit with the Postal Department of the United States, was that affidavit true or false?

A That was true to the best of my knowledge.

Q It was true to the best of your knowledge?

A Yes.

Q Do you see the book I hold in my hand?

A Yes.

Q Are you familiar with it?

A Yes.

Q What does it contain?

A That's the book I previously described which contains the sales journal or ledger and accounts receivable ledger.

Q Were all of your sales up to 1964 contained --

THE COURT: Let's get it marked for identification.

MR. MC GRATH: Can I just have the one question, sir.

Q Were all of the sales up to the end of 1964 contained in this volume?

A It was my understanding that all the bulk sales were contained.

Q How about individual sales?

A No.

MR. MC GRATH: I ask to have this marked for identification.

xxx (Defendants' Exhibit BH marked for identification.)

MR. MC GRATH: I will offer it now in the absence of any objection.

MR. WENTZEL: I have no objection.

THE COURT: Received.

xxx (Defendants' Exhibit BH for identification received in evidence.)

THE COURT: This is a book that has records of bulk sales but not individual subscription sales, right?

THE WITNESS: That's right.

Q Where did you keep the individual subscription sales?

A They were in the circulation group.

Q Were they kept in a book like this?

A I don't know how they were kept. The last time I had seen them they were in a shoe box.

Q So that the record is clear, in or about July of 1964 there were less than a thousand paid individual subscriptions; is that correct?

A Around a thousand.

Q Around a thousand?

A Yes.

Q Would it be below a thousand?

A I doubt it.

THE COURT: Let me get this: You are saying what is the thousand figure again?

MR. MC GRATH: Paid subscription, not bulk, not fleet operators.

THE COURT: The owner driver individual subscriptions?

MR. MC GRATH: Not just owner driver, Judge, any individual.

THE COURT: What was the date?

MR. MC GRATH: July of 1964.

Q Did this thousand figure represent all owner drivers or were there other individuals?

A There could have been others but I didn't, as far as I can recall, I didn't question each subscription that came in, whether it was an owner driver.

Q In 1963 did you keep individual subscription records in this book?

A No.

Q In 1962 did you keep individual subscription records in this book?

A No.

Q I now show you a page from your ledger book entitled on the top "Miscellaneous."

THE COURT: This is from BH?

MR. MC GRATH: That's correct, your Honor.

Q Would you tell us what the entries on the page marked miscellaneous refer to?

A I really don't know. What it appears to be is a listing of fleets and in a couple of cases I see owner driver organizations.

Q Do you see dollar amounts next to an invoice number?

A I didn't see that. I assume what you say is correct. It looks like --

Q Is the second column invoice numbers or what appears to be invoice numbers?

A They are numbers, and it would make sense for them to be invoice numbers.

Q And does the column of figures, which would be the third column, does that appear to be dollar amounts?

A Dollars and cents.

Q Yes, dollars and cents. Do you have a figure here for Helen? $20.20?

A Yes.

Q And for Caldor, $3.20?

A Yes, sir.

Q And for Beanut, $3.60?

A I assume you are reading it correctly. Of course, you know I have no copy in front of me.

THE COURT: Let's take your word for it. Now what is the next question?

Q Now, are these figures and these names and these amounts, do they represent the sales to fleets or do they represent the sales to individuals?

A I think those names you read were the names of fleets. Although I am not positive in every case.

Q There is a fleet called Helen?

A Yes, there was.

Q There's a fleet called Caldor?

A I believe so.

Q Now, at the time that you had, that you received the first cancellations of subscription, did you cut back immediately on your press run?

A The press run was cut back according to the cancellations in the next available issue. It depended upon exactly when the cancellation was received in relationship to when was the deadline for getting in the press run and printing the paper.

Q So now between July and December of 1965, you would have cut back approximately 6300 copies; is that correct?

A (No response.)

Q Or January of 1965.

A I believe so.

Q And where did you cut back from, sir, from the Taxi Age or Taxi Weekly?

A I don't know.

Q Well, if your affidavit of 1965 was not true, then you could have cut back from either Taxi Weekly or Taxi Age; is that correct?

A That's right.

Q Now, let's go back over the figures, if we can. Your print run in 1964 was approximately 11,000.

A That's right.

Q 8,000 --

A The total circulation.

Q Your print run had to be 11,000 if your circulation was 11,000; isn't that correct?

A No, it isn't. The print run was probably a bit higher. We didn't count the circulation. Those copies that went to the office or -- we generally had 50 or a hundred, 150 in the office, and there were miscellaneous copies in the print run that we did not claim as being circulated because they weren't.

Q It would be 200 copies?

A Somewhere in that neighborhood.

Q So you had 11,200 print run.

A In that area, yes.

Q And you told us that 8,000 were paid and 3,000 were free.

A Yes.

Q And of the 11,000, 7,000 went to the fleets and 4,000 went to the owner operators, or people you called owner operators.

A Yes.

Q Now, some of the fleets, the entire fleet, the circulation was paid for?

A That's right.

Q And in addition to that you had a thousand paid?

A Yes, sir.

Q And when you mailed, you told us that, in answer to Mr. Wentzel's question I believe, that Taxi Weekly was mainly mailed second-class and Taxi Age was delivered third-class or parcel post.

A Yes.

Q And of course in 1964 third-class postage cost three or four times as much as second-class postage; isn't that correct?

A I have no recollection of what the ratio was. I know it was more expensive.

Q You know it was more expensive. Would you say it was two times more expensive?

A I don't know.

Q What did you mail to the alleged owner operators, Taxi Weekly or Taxi Age?

A (No response.)

Q Let me refresh your recollection, sir.

A I'm not sure but I believe --

Q Didn't you tell us before the majority got Taxi Age, in answer to Mr. Nessen's questions, the majority of the owner operators got Taxi Age and the minority got Taxi Weekly?

A That's what I believe it was.

Q So of the 4,000 that went to owner operators, 3,000 were free at the most and at the most 1,000 was paid, and if the majority of them got Taxi Weekly -- Age, rather -- at third-class postage, you were paying at least twice as much to send out your free copies as you were paying to send out your paid copies; isn't that so?

A It cost me, yes, sir.

Q So it would cost you more to send out copies that you didn't get paid for and it cost you less to send out copies that you got paid for?

A That's right.

Q And this was all done with the feeling of sentimentality because you wanted to maintain the age of Taxi Age; is that correct, sir?

A I didn't say that.

Q Now, when you say that the post office told you to do it this way, to make this affidavit, is it your testimony that the post office told you to swear falsely to an affidavit that they were going to accept?

THE COURT: Come on, nobody is saying that. That's just argumentative. Do you have anything else?

MR. MC GRATH: Just one other question.

Q Did the post office tell you to put these figures down when the post office, or the gentleman from the post office knew that they were false? Is that what your testimony is, or is it your testimony that you made up the figures and swore falsely to them?

A I said that the '65 figures were not correct.

Q You said that you swore to that also, didn't you?

THE COURT: Yes. He said that.

Q The question is this: When you went and spoke with the individual at the post office, were you -- withdrawn.

As a publisher, were you familiar with the regulations of the postal authorities?

A I didn't get the last word.

Q As a publisher, were you familiar over the years with the regulations of the postal authorities?

A I had just a vague notion of what the regulations were. I was no expert.

Q Were you familiar with the fact that you had to, according to postal regulations, maintain a paid subscription list?

A Yes.

Q Were you aware of a regulation by the Postal Department in 1964, a ruling that in order for two publications to be considered dissimilar and not to be required to be included in the affidavit of ownership, that at least 25 percent of their content had to be different?

A I have never heard of that before.

Q Never heard of that?

A No.

MR. MC GRATH: Thank you very much.

THE COURT: All right. Is there anything else at all from Mr. Peterman?

MR. DINKES: Yes. I am interested in a couple of things.

CROSS-EXAMINATION

BY MR. DINKES:

MR. WENTZEL: I didn't have any redirect, your Honor, so I don't know what category this falls into.

THE COURT: Do you want redirect?

MR. WENTZEL: No.

THE COURT: All right.

MR. WENTZEL: Your Honor, I object to his carrying on. Are they going to play tag here all morning or what? He has had his questioning.

MR. DINKES: Can't I follow up on Mr. McGrath's?

THE COURT: Just a little bit. I think we have to draw it to a close. We have had this witness quite a while.

Q When you said some false things and swore to some false things in this affidavit, was the fact that there had been 4500 copies of Taxi Weekly printed, was that false?

A I don't recall.

Q Well, do you remember about how many copies of Taxi Weekly you were printing in October of 1965?

A No.

Q And Taxi Age all put together?

A No. I think it was somewhere in that neighborhood, certainly.

Q So in other words --

THE COURT: Neighborhood of what?

THE WITNESS: It was somewhere in that neighborhood.

THE COURT: All right.

Q So in other words you told the postal authorities that you were printing all of it -- you gave them the number from the total print of both Taxi Weekly and Taxi Age when you put down 4500?

A I don't know whether I was printing Taxi Age at that time.

Q Well, didn't you tell me that you were in fact printing Taxi Age?

A I said I did continue it, I believe, after I bought the last 50 percent from Mr. Wysinger, but I don't recall how long I continued.

Q And Mr. Peterman, you continued to send these out second-class mail, didn't you?

A That's right.

Q At a considerable saving to yourself, right?

A At some saving to the corporation.

Q And is that the reason that you lied to the postal authorities, to save some money?

A The reason was to stay in business.

Q I think you can answer that yes or no. Was the reason that you lied to them to save money? Was that the reason?

A I can't answer that yes or no.

Q Then I will ask you another question: When you made out this affidavit, you also had it notarized in addition to signing it yourself, didn't you?

A I don't know if it required a notarization. I don't think it did.

Q Were you aware at the time, or are you aware now of a criminal penalty for swearing falsely in an affidavit? Are you aware of the fact that it's perjury?

A I was not aware of that.

Q Are you aware now?

THE COURT: I think you can argue whatever you need to argue before the jury, but let's -- we are not adding anything.

MR. DINKES: If your Honor please, all right,

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I have no further questions.

MR. NESSEN: Your Honor, just one question.

THE COURT: One question by Mr. Nessen.

BY MR. NESSEN:

Q Was the affidavit of October 12, 1964 false, too?

MR. WENTZEL: It's been asked and answered. He has been asked that once.

MR. NESSEN: I'm sorry, I missed it.

THE COURT: All right, we will terminate this. You may step down.

(Witness excused.)

THE COURT: 2:15.

(Luncheon recess.)

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AFTERNOON SESSION

2:15 p.m.

(At the bench.)

MR. WENTZEL: Your Honor, in view of Mr. Nessen's statement to the jury concerning the trebling of the damages, I move for a mistrial.

THE COURT: Okay. The motion is denied.

(In open court, jury present.)

MR. WENTZEL: Your Honor, I think we have two depositions.

MR. PRATT: That's right. Mr. Wysinger and Mr. Ulrich.

THE COURT: Okay.

MR. NESSEN: Which is first?

MR. WENTZEL: Mr. Wysinger.

Your Honor, you will recall that when we proposed to read Mr. Wysinger's deposition before there was a question about whether he at this time lives beyond 100 miles, and I might put on the record that I had contacted -- let me step back and say that in the course of the pre-trial depositions we received a letter from his doctor and I contacted that medical center and spoke to the administrator who told me their records showed him to be deceased.

THE COURT: When did the death occur approximately?

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MR. PRATT: I asked that question and they did not have any record of that.

MR. NESSEN: We will accept that representation, your Honor.

THE COURT: Now what was the date of Mr. Wysinger's deposition?

MR. PRATT: His deposition was taken on September 25, 1970.

THE COURT: Do you have a copy of that?

MR. NESSEN: We have an extra copy, your Honor.

THE COURT: All right.

MR. PRATT: Beginning on page 2 at line 9. These questions, incidentally, are by Mr. Wentzel.

"Q Mr. Wysinger, how many years have you lived at this address?

"A You mean here in Montauk or just right here?

"Q Right here at this address.

"A 1964.

"Q And did you live in Montauk prior to that?

"A Yes.

"Q How many years?

"A Just round figures, a rough guess, around ten years. Is that right? You would say around ten years."

And then the answer continuing "Round figures, it may be longer."

And he makes a question to an unsworn person.

"Q Do you have any other home?

"A Yes.

"Q Where is that?

"A Florida.

"Q What is the address in Florida?

"A 545 South Atlantic Boulevard, Fort Lauderdale.

"Q Are you retired now?

"A Right.

"Q What was your occupation?

"A Editor. I was in the newspaper business.

"Q For how many years?

"A Approximately 35 years, I guess, 30, 35 years.

"Q By whom were you employed?

"A By myself mostly.

"Q What company did you work for?

"A Well, at one time I originated Trade Newspapers Corporation.

"Q Any other companies?

"A The Wysinger Publications.

"Q Is that the name of a corporation?

"A No; just a name. It wasn't even registered, I don't think.

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"Q Were you also employed by Taxi Weekly, Inc.? Is that one of the Wysinger publications?

"A No. Taxi Weekly was owned by Taxi Weekly.

"Q Did you work for that company?

"A Yes.

"Q For how long did you work for Taxi Weekly?

"A Roughly about 25 years.

"Q And what position did you have with that company?

"A Editor and publisher.

"Q Did you own the stock of Taxi Weekly at any time?

"A Yes.

"Q When did you first acquire stock of Taxi Weekly, Inc.?

"A When it was first incorporated, which would be about 25 years ago.

"Q Was that about 1945?

"A Approximately.

"Q And was the newspaper known as Taxi Weekly published prior to 1945?

"A No, it was known as Taxi Age.

"Q. It was known as Taxi Age?

"A Yes.

"Q For what period of time was Taxi Age published?

"A From 1932 or 33. I forget now. '32 or '33.

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"Q And did that newspaper serve the New York City taxi industry?

"A Yes.

"Q And then, when was Taxi Weekly first published?

"A Approximately 1945 I published it, in 1945.

"Q Was Taxi Weekly published continuously thereafter?

"A Yes.

"Q As long as you were with the company?

"A Yes."

MR. TURCHIN: May I continue, if your Honor please. Line 20.

"Q Did Taxi Weekly, Inc., the corporation, have any other publications?

"A Yes. The Taxicab Industry Auto Rental News, a magazine."

MR. PRATT: Now continuing on page 8 at line 24.

"Q Well, now, addressing myself to the few years prior to 1964, how many days a week did you work?

"A Mondays until Thursday.

"Q Monday, Tuesday, Wednesday and Thursday?

"A Yes."

Turning to page 10, line 3.

MR. TURCHIN: Your Honor, may I go back to page 8, line 11.

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"Q Now, you held the position of editor and publisher of Taxi Weekly.

"A Yes.

"Q Through the time that you were there; is that correct?

"A Correct."

MR. PRATT: On page 10 at line 3.

"Q Did you solicit any advertising? Again, say 1960 to 1964.

"A No, that was left up to -- sometimes.

"Q Was that something you did a great deal of?

"A You mean prior to --

"Q During this period, 1960 to 1964.

"A Well, I handled the anniversary and the Christmas editions mostly."

On page 12 at line 6.

"Q Did you perform any duties for Taxi Weekly outside the office?

"A Mostly affairs for raising money."

MR. TURCHIN: Can you hold on a minute. I lost the last page. What were you on there?

MR. PRATT: Page 12.

MR. TURCHIN: Page 10, line 18.

"Q Are those --"

THE COURT: We got down to page 10, line 17. Now where are we going?

MR. TURCHIN: To line 18 on page 10.

"Q Are those -- what happened to the anniversary and Christmas editions?

"A I usually telephoned the people and solicited the advertising over the telephone."

Now on page 11, line 4.

"Q Did you write editorials?

"A Well, I stated before, I was the one that mostly handled the thinking and the general thought because I was familiar with what the industry needed.

"Q I see."

"A Mr. Peterman, who was practically new in the industry, you asked me from '60 to '64, he naturally would come to me, and so did Mr. Zeff."

MR. PRATT: Can we continue on that page then in view of this reading.

"Q Who actually did the writing of the editorials to reflect your thoughts?

"A Mostly Mr. Zeff.

"Q Did you keep the financial books of the company?

"A No."

Then beginning on --

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MR. TURCHIN: Are you starting at the top of page 12?

MR. PRATT: No, line 6.

MR. TURCHIN:

"Q Did you review them while you were in the office?

"A No. I want to qualify that. Mostly done by Mr. Peterman.

"Q Did you perform any duties for Taxi Weekly outside the office?

"A Yes."

MR. TURCHIN: It reads "Q" but it's "Answer: Yes."

MR. PRATT: And then continuing the answer on line 17.

"A Mostly affairs for raising money for UJA, other functions like that."

And then on page 13 at line 7.

"Q Did you go down to your Florida home during the winters?

"A Yes.

"Q Did you and Mr. Peterman, as co-owners during these four years prior to 1964, take a salary out of Taxi Weekly?

"A Yes.

"Q How much was that salary?

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"A I don't recall at this time.

"Q Was it the same amount each week?

"A Yes. I'm sure.

"Q Did you also have a division of profits at the end of the year?

"A (No response.)

"Q Would you answer the question.

"A Mr. Peterman would be the one who would usually handle bonus.

"Q Bonuses to yourself and Mr. Peterman?

"A Both equal.

"Q They were equal?

"A They were both equal.

"Q Did there come a time when you attempted to dissolve the corporation, Taxi Weekly, Inc.?

"A Yes.

"Q When was that?

"A '64, I think it was, when he bought me out."

Then on page 15 --

MR. TURCHIN: If I could continue on page 14, line 25.

"Q What were your reasons for this attempted dissolution?

"A I thinking one way according to the way I thought these many years and building up the publication, and Mr. Peterman just thought the opposite way.

"Q Were there any other reasons you can recall?

"A No, except for the fact that he kept picking all the time and I just got tired of it."

MR. PRATT: Now continuing on page 15 at line 11.

"Q Was one of the reasons that you believed Mr. Peterman had become persona non grata with the fleet owners and the taxicab industry?

"A That I wouldn't know. I mean, I had no direct knowledge of that."

On page 17, at line 16.

"Q Did you have any discussions with Mr. Botwinick about Mr. Peterman?

"A None that I can remember."

MR. TURCHIN: Can I start a little before that, page 17, line 13.

"Q Did you have any discussions with Mr. McIntyre about Mr. Peterman?

"A None."

MR. PRATT: Then continuing.

"Q How about Mr. Friedlander?

"A Not that I remember. I mean, we had just general conversation. I mean, but nothing of any consequence because

Mr. Peterman's differences and mine were simply separate an apart from them."

MR. TURCHIN: If I could continue on 17, line 24.

"Q Did you advise Mr. Friedlander that you were goin to start a dissolution proceeding?

"A No.

"Q Did he suggest to you that you should?

"A Of course not.

"Q Did anyone suggest to you that you should dissolv Taxi Weekly?

"A Nobody. But the natural results of what was goin on between Mr. Peterman and myself. The year before that, as a matter of fact, you can get this from the record."

MR. PRATT: Line 15.

"Q Did any fleet owners discuss with you Taxi Weekly' editorial positions?

"A Of course not."

Then on page 19 at line 3.

"Q And didn't any fleet owners ever discuss with you Taxi Weekly's position on various issues in the taxi industry?

"A Didn't have to. I knew the industry for nearly 40 years.

"Q Did any fleet owners ever tell you they disagreed with Taxi Weekly's position?

"A No.

"Q Did any fleet owners tell you in 1964 that they disagree with Taxi Weekly's position on the fare increase which was under discussion at that time?

"A I don't remember anything like that.

"Q And how about -- do you recall any discussions with any fleet owners about Taxi Weekly's position concerning the union drive in 1964?

"A They never discussed it with me.

"Q How about Mr. Friedlander? Did he ever discuss with you Taxi Weekly's position on the fare increase?

"A I knew what the feeling was on the fare increase. Mr. Friedlander didn't have to discuss it with me.

"Q You knew what his position was?

"A Well, I knew the entire position from Mr. Peterman's position, too.

"Q Well, did Mr. Friedlander or Mr. Botwinick or Mr. McIntyre or even Mr. Plotsky -- do you know Mr. Plotsky?

"A Well, not too well. I never had no close relationship.

"Q Did any of those people suggest to you that Taxi Weekly was not accurately reflecting their position on the proposed fare increase?

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"A Not that I recall.

"Q How often did you see Mr. McIntyre?

"A Well, no more times than I had seen him before that. I would bump into him on the street as I was coming off the subway and I used to go to a cafeteria."

Continuing on page 22 at line 18.

MR. TURCHIN: On page 21, your Honor, line 6.

"Q In 1964 and before you sold out to Mr. Peterman, how often did you talk to Mr. McIntyre, that is, still while you were at Taxi Weekly?

A Every once in a while because that job that he held was public relations. We were in the publishing business."

Line 17.

"Q Was Mr. McIntyre a source of news for Taxi Weekly?

"A One of them."

MR. PRATT: On page 22 at line 18.

"Q In the course of the dissolution --"

MR. TURCHIN: Excuse me. Page 22, line 4.

"Q Did anyone else tell you that Mr. McIntyre wanted to start another newspaper?

"A No.

"Q Did anyone suggest to you that you should get rid of Mr. Peterman?

"A No.

"Q Did anyone say to you that subscriptions to Taxi Weekly would be dropped unless Mr. Peterman got out?

"A Of course not.

"Q Did anyone say to you that subscriptions to Taxi Weekly would be dropped unless the editorial policy of the newspaper was changed?

"A No."

MR. PRATT: Continuing on line 18.

"Q In the course of the dissolution proceedings, did you state that you believed Taxi Weekly might lose business unless there was a dissolution?

"A No, not that I can remember.

"Q What reason did you give the Court that a dissolution was necessary?

"A As I stated before, we just couldn't see eye to eye. His policies were entirely different from mine and these opinions changed, and I had been in the business for nearly 40 years as a taxicab industry before publishing and I knew exactly what the taxicab industry needed without even having to consult any of the people there. That's the reason we got our advertising in most cases. That's the reason I was in the business that long."

MR. TURCHIN: Line 20 on page 23.

"Q Did you make an offer to purchase Mr. Peterman's

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stock?

"A If I remember correctly, that was a contract made up between his attorney and my attorney in New York City, I think, in 1963. The contract was completely written up, if I recall, where he was going to purchase my interest, my stock interest, and I had changed my mind because of certain things that occurred.

"I told him when I came back on Monday morning I changed my mind about this. I didn't agree with what occurred and what you had said over the weekend to Miss Grant who had been with me for about 18 or 20 years.

"Q She was an employee of Taxi Weekly?

"A Yes. And I changed my mind and didn't sign the contract. So Mr. Peterman was the first one that had been pushing to buy me out, and as I stated, my 1963 contract, which I voided."

MR. PRATT: Now continuing on page 27 at line 13.

"Q Let me just see if I can refresh your recollection. Did you talk to Gerals Naren?

"A No. As a matter of fact, I had very little conversation with Gerals Naren for many years.

"Q How about Jack Plotsky?

"A Very little.

"Q How about Ira Suchman?

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"A Very little.

"Q How about Morris Heit?

"A Very little.

"Q Leonard Schaffran?

"A The same thing.

"Q You didn't speak to him?

"A Only what I told you before, I would talk over the telephone for Christmas ads and anniversary ads.

"Q Did you speak to Milton Marks at the time he canceled?

"A Milton Marks? Who is he?

"Q Ann Service Corporation.

"A I don't recall it.

"Q How about Morris Lefkowitz?

"A Lefkowitz? There are several Lefkowitz.

"Q Morris Lefkowitz of M & S Maintenance Corporation.

"A I don't recall.

"Q How about Leon Murstein, did you speak with him?

"A I think the last time I talked to him I met him up at one of the diners when Mr. Peterman was there, but perfunctory conversations.

"Q Did you speak with him in connection with his cancellation of Taxi Weekly?

"A No, not that I remember.

"Q How about Nathan Levine, did you speak to him?

"A Very little conversation with him.

"Q Did you speak with him about his cancellation of Taxi Weekly?

"A No.

"Q Do you recognize each of the names I just read, didn't you?

"A Most of them. Most of them."

Then on page 30, at line 18.

"Q Mr. Wysinger, directing your attention to page 6 of Plaintiffs' Exhibit B, the petition for dissolution, I see the statement in there 'I have been told on numerous occasions that he,' referring to Mr. Peterman, 'is a persona non grata with numerous fleet owners and with trade associations and the leaders thereof.'

"Now does that refresh your recollection that you had been told by fleet owners that Mr. Peterman was persona non grata?

"A I don't remember being told by anybody in the industry but I could sense what was going on, going along, what was going on.

"Q What was it you sensed?

"A That things weren't running smoothly between Mr. Peterman and myself.

"Q Why did you refer to fleet owners in this sense?

"A Well, it might just come to my mind spontaneously at that time.

"Q Did you feel Mr. Peterman was persona non grata with fleet owners?

"A No. I will say right here and now, he had a lot of good friends in the industry.

"Q Was Mr. Peterman persona non grata with any fleet owners?

"A Not that I know of. It could have been a perfunctory statement at the time."

Then on page 38. At line 19.

MR. TURCHIN: If I could read on page 32, line 7.

"Q From your experience in the industry for many years, did you gather or sense that Mr. Peterman was persona non grata with the fleet owners?

"A I wouldn't say with all the fleet owners, no.

"Q With any of the fleet owners?

"A Could have been.

"Q Was he?

"A I don't know.

"Q Was that the conclusion which you reached at that time?

"A I'd say yes.

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"Q What facts caused you to arrive at that conclusion?

"A The fact that I was in the business and understood. As a matter of fact, in 1963 he was at a radio television broadcast and during the fare rate increase which we were fighting for, we, as the publications and the industry, he was for division of -- we asked for a ten-cent increase. When I say 'we' I am talking about the industry generally, including part of the paper, and he was for the division of the dime being given partially to the drivers in health benefits, sick benefits and part of it to go to the driver directly. In other words, that the fleet operators were to get nothing out of it, no benefit whatsoever."

On page 38 at line 9.

"Q What is your recollection today with respect to this statement on page 6 of your petition? Do you recall that you were told on numerous occasions that Mr. Peterman was persona non grata with numerous fleet owners?

"A No, I don't recall that. I don't recall it now."

MR. TURCHIN: Your Honor, can I read on page 37, line 14.

"Q What was it that wasn't going right that made him persona non grata with fleet owners?

"A We were losing business.

"Q You were losing subscriptions?

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"A I'd say sure, of course, subscriptions and business as far as that goes, and the other publication too, in other words, the magazine. Now I could sense and know there wasn't any business coming in. We were losing business in the taxi industry and it had nothing to do with the fleet operators of New York City because that went out of the City of New York."

MR. PRATT: That's all we have.

MR. NESSEN: Just a moment, your Honor. We want to see if there is something else.

THE COURT: All right.

(Pause.)

MR. TURCHIN: On page 46, your Honor, line 2.

"Q Was there a decline in profits of the company during those years, referring to '63, '62 and '61?

"A I could see the handwriting on the wall. We weren't spending any money for public relations. We weren't making any attempt to go out and get any advertising. Both for the magazine and the local paper. Our telephone bill was only $65, $70 a month. He came in at one o'clock in the afternoon most every day."

"He" referring to Mr. Peterman.

THE COURT: Okay, what's next?

MR. PRATT: The deposition of Mr. Ralph Ulrich,

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your Honor. Mr. Ulrich is not a party. He resides now, I am led to believe, farther than 100 miles from New Ysrk. In fact, he resides in Illinois.

The deposition was taken on October 8, 1968, and the questions are by Mr. Geller, beginning on page 4 at line 7.

"Q Mr. Ulrich, what is the name of the company by whom you are employed?

"A Rockwell Manufacturing Company.

"Q And were you employed by them in the years 1964, 1965 and 1966?

"A Yes.

"Q What's the nature of their business?

"A Power tools, valves, meters, various descriptions.

"Q And are you in a particular division of that company?

"A Taxi Meter Division.

"Q What's the nature of the business of that division?

"A We sell taxi meters for taxicabs.

"Q Is that your sole business in that division?

"A Yes.

"Q And did you, in 1964, '65 and '66, sell taxi meters to taxi owners in New York City, among other places?

"A Yes.

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"Q Where is the headquarters of your division?

"A Hopewell, New Jersey.

"Q And is this where you have your office?

"A Yes, sir.

"Q What is your position in the division?

"A Sales manager of the Taxi Meter Division."

And then turning to page 18.

MR. TURCHIN: Your Honor, on page 8, line 18.

"Q Do you recall when it was that you discontinued the display advertising? Did I get that date from you?

"A I thought it was about six months before the magazine or the paper went out of business.

"Q Do you recall the year? Was it 1965?

"A Maybe late '65 or early '66, I think."

MR. PRATT: This is on page 18 at line 17.

"Q I would like to know from you whether you had any information or belief when you discontinued or when Rockwell discontinued its advertising in the Taxi Weekly, as to whether or not this was something that the taxi fleet owners desired Rockwell to do.

"A Well, I heard rumors. I would say that, rumors.

"Q From whom did you hear the rumors?

"A I wouldn't know specifically.

"Q Did you hear them from Glen Moore?

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"A Could have been.

"Q Well, you say could have been. Again that raises just a possibility. Did you, to the best of your recollection, hear such rumors from Glen Moore?

"A I don't recall it but it's probably possible.

"Q You don't deny, then, you just have a failure of recollection?

"A I wouldn't deny it. That's right."

MR. TURCHIN:

"Q What was the substance of those rumors?

"A I wouldn't know."

Could we have a moment, your Honor, to go back?

THE COURT: Yes.

(Pause.)

MR. PRATT: Let me just read the next question and answer.

"Q Well, apparently it was that they did desire you to discontinue your advertising in Taxi Weekly. I take it that that's what we are talking about.

"A I knew or I heard, and I don't know who or where, that some of the advertising was being taken out of Taxi Weekly."

MR. TURCHIN: Your Honor, on page 13, line 10.

"Q Did Glen Moore tell you in any of these

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conversations that he had been requested or told by his taxi owners of New York City, or any of them, or their representatives, that you should have your division discontinue or cut down its advertising in Taxi Weekly?

"A No.

"Q Did Moore tell you, that is, when he was speaking to you about the changing over from Taxi Weekly to The Hackman, did he tell you that the taxi fleet owners had been talking to him about this rule, about Rockwell changing over?

"A No.

"Q He did not tell you that?

"A We weren't influenced by anything like that.

"Q Did he tell you that the taxi fleet owners had told him that they wondered why in the hell your division kept on advertising in Taxi Weekly and using somebody else's words of course?

"A Never did that before."

THE COURT: Wait a minute. It's not never did. Wasn't that corrected?

MR. PRATT: Our copy is corrected to never heard.

MR. TURCHIN: Never heard that before. I'm sorry. Still on page 14, line 16.

"Q Did any persons whatsoever, I have just mentioned taxi fleet owners or their representatives, do you recall

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that any person or persons requested you through Glen Moore on any occasion to discontinue or cut down your advertising in Taxi Weekly?

"A I don't recall anything like that.

"Q Well, you say you don't recall. Do you deny that there were any such conversations or are you just saying that you just don't have any recollection?

"A I would deny it."

On page 16, line 24.

"Q Mr. Ulrich, all I want to know is whether it was a matter of your knowledge, information or belief at the point where Rockwell discontinued its advertising in Taxi Weekly, that this was or was not something which the taxi fleet owners desired Rockwell to do. Now did you have such knowledge, information or belief of any source whatsoever?

"A It had no bearing on what we on our action, nothing outside had any bearing on it except the economy. I mean the financial aspect of which newspaper we should advertise in.

"Q Now, I have not asked you whether it had a bearing on your decision. That's a separate point. I have already asked that in some words. I want to know whether you just happen to know whether the taxi fleet owners desired you to do what you did, whether or not it had a bearing on what

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you did.

"A Well, I don't know. I did not know it."

MR. PRATT: 23, line 24.

MR. TURCHIN: Page 21, your Honor. Line 17 on the page.

"Q Well, what were these rumors that you did hear?

"A That the newspaper was going downhill and it was losing circulation and losing advertising, and why should we continue if it was becoming less and less attractive."

MR. PRATT: On page 23 at line 24.

"Q Well you say no bearing but I want to know whether it was ever discussed by you with Glen Moore or Gordon Cook, or anybody in your company that the Taxi fleet owners didn't like Taxi Weekly and wanted your company to discontinue its advertising in that paper. Was that ever discussed among --

"A It's possible. It's possible it was.

"Q Well, you say it's possible, and anything of cours is possible.

"A As far as Cook is concerned, I don't think we discussed with Cook.

"Q Was it discussed with you?

"A Discussed with Moore.

"Q Now, who discussed it with Moore?

"A I did.

"Ulrich

"Q Did you discuss the question -- what was it that you discussed with Moore on this subject?

"A Whether we should discontinue advertising in Taxi Weekly.

"Q No, that's not -- what I am asking you is whether the reason for it was the taxi fleet owners desired that you do so.

"A Absolutely not.

"Q Did you ever discuss that with Moore?

"A Absolutely not.

"Q You never discussed that with Moore, the attitude of the taxi fleet owners towards Taxi Weekly. Well just once more, did you ever discuss with Moore the attitude of the fleet owners to Taxi Weekly?

"A Well, I will say yes."

MR. TURCHIN: Your Honor, continuing on page 25, line 9.

"Q Well, you say you will say yes. What did you discuss with him about that subject? What did you discuss with him and what did he say and what did you say on that subject?

"A Other advertisers were discontinuing their advertising.

"Q Well, other advertisers in Taxi Weekly were not taxi fleet owners. I thought you had just said that Moore discussed with you the desire of the taxi fleet owner that Rockwell discontinue its advertising in Taxi Weekly. That's what I am getting at. Did he discuss that with you? I am talking about any taxi fleet owners, unless he mentioned them by name, and then I would like to get their names.

"A There was no mention of names.

"Q Okay. But did Moore mention to you that taxi fleet owners had told him that they wanted Rockwell to discontinue its advertising in Taxi Weekly?

"A I don't recall any such statement, Mr. Geller.

"Q Let me ask you this: Are you denying it or are you just saying at the present time that you have no recollection on this subject?

"A I don't have a recollection."

MR. PRATT: Continuing on page 26 at line 9.

"Q Let me ask you this: Are you denying it or are you just --"

THE COURT: You already read that.

MR. PRATT: I'm sorry. I intended to pick up the next line at 13.

"Q Okay. Now did you ever have a conversation with Les Peterman here on the subject of, on the general subject of Rockwell's discontinuing its advertising in Taxi Weekly?

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Did you discuss that with Les Peterman?

"A No, I don't recall any discussion with him."

MR. NESSEN: I object to this testimony, your Honor, on an exparte discussion with Les Peterman, your Honor.

THE COURT: Overruled.

MR. PRATT: Now I am turning to page 30 at line 2.

"Q But what I am asking you, Mr. Ulrich, was, from what you heard now, are you telling me that you don't believe that was your voice on that tape?

"A No. I guess I can't say that.

"Q You cannot say that?

"A I can't say that.

"Q You cannot say that?

"A No.

"Q That was your voice on that tape?

"A Must have been.

"Q Now, do you recall after hearing that that you told Mr. Peterman that -- well, I will quote your language as I heard it and have it down here -- that the taxi fleet owners were requesting --"

MR. DINKES: If your Honor please, isn't this trying to get in the back door what he couldn't get in the front door?

THE COURT: No, defense counsel was there to cross-examine, so I will permit it.

MR. PRATT:

"Q -- requesting me through Glen Moore up there several times," that is the end of the quote, "to cut down the Taxi Weekly ads because that was what Mr. Peterman was talking about. Does that refresh your recollection that Glen Moore --"

Then there was an objection.

"Q When was that?

"A This was in Chicago in September 1965.

"Q Do you remember telling Les Peterman that Glen Moore had told you several times that the taxi fleet owners were importuning him to have Rockwell cut down their advertising in Taxi Weekly and that you sloughed it off?

"A I never recalled it. If it hadn't been --

"Q But you don't deny it?

"A I don't deny it.

"Q Do you recall hearing -- well on that type does it call to your mind that you joked with Les Peterman about the fact that although you were advertising in The Hackman, The Hackman had only one or two ads, one more besides yours, the Dodge ad, and that you couldn't afford to keep up advertising in a newspaper of that sort, do you remember that?

"A No, I don't recall it.

"Q Well, wasn't that the fact, that at the time that you changed over from Taxi Weekly to The Hackman, that The Hackman had only one other ad besides yours?

"A You see, I didn't know except that it says it there.

"Q It says it there on the tape, you mean?

"A Yes.

"Q And that was your voice that was saying whatever was said?

"A Apparently it was.

"Q What we are going into is what you said there was the fact, was it not, that the taxi fleet owners had been talking to Moore and Moore did talk to you about cutting down your ads in Taxi Weekly because the taxi fleet owners wanted you to; isn't that the fact?

"A Must have, yes."

That's all that we have.

THE COURT: Is there anything else?

MR. WENTZEL: Your Honor, last week I mentioned that we had some transcripts of conversations between Mr. Peterman and some of the defendants, and as you may recall we read, I believe, from Mr. Marks' transcript, and

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at that time I just wanted to wait and go through a transcript of a conversation between Mr. Peterman and defendant Sal Baron on July 20, 1966. I would just like to read one passage on page 9 from that transcript.

MR. NESSEN: Will you wait just a moment on that? Can we have the usual ruling, your Honor, about against who this is admissible?

THE COURT: Surely.

MR. MC GRATH: I object at this time, your Honor. This is not an EBT. This is the transcript.

THE COURT: Overruled.

What is the date of that?

MR. WENTZEL: This is a conversation that occurred on July 20, 1966, between Mr. Peterman, Mr. Baron with Ben Bine.

THE COURT: Again, ladies and gentlemen, conversations out of the presence of the other defendants are admissible with respect to the particular defendant speaking, they are Mr. Baron here, and they are only to be considered against others if there is a logical basis for connecting them to the others. Okay.

MR. WENTZEL: "Well, Sal, what I am trying to get at, why, you know, it's not doing anybody any good, this gang-up on me, this trying to put me out of business, this

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saying things to my advertisers. I mean, this isn't doing anybody any good.

"Baron: You can't deny us that privilege. It is a privilege to talk to people that we are friendly with to hurt you if in our opinion you are out to hurt us, and obviously you are."

MR. MC GRATH: May I continue to read from that?

THE COURT: Sure.

MR. MC GRATH: Page 10.

MR. NESSEN: Can we have a date for this conversation?

THE COURT: He gave the date. July 20, 1966.

MR. MC GRATH: I think we may have had some of this before and I am trying to be careful not to read anything that we read before.

Page 10. Sal Baron: "I don't think there is something that is libelous about, behind the, my statement, that I think Morris Marken is behind you. There is nothing to be ashamed of. There's nothing libelous about it.

"Peterman: Well, it's being used to --

"Baron: You think that the name of Morris Marken is something that has a stigma attached to it?

"Peterman: Of course I do.

"Baron: Why?

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"Peterman: Because it's being used to get advertisers out of my newspaper, that's why. You know that. You know that.

"Baron: You, you, you think, you think that a fellow who sells Dodges or Fords or something else, after reading your straight reporting on cabs with partitions, needs somebody to tell them or to talk to them into taking their advertising out? They would do it automatically.

"Peterman: Now, Sal, they took the advertising out way before this thing.

"Baron: They took it out before?

"Peterman: Way before the task force, so you are bullshitting me. You are bullshitting me.

"Sal Baron: Well, way before the task force I had no interest in whether, who advertises in your paper. If you are going to say right, after you attacked me as being a drunkard, then I would say yes. I did everything in my power.

"Peterman: Overlap -- I didn't --

"Baron: Ah, stop.

"Peterman: I didn't attack you as being a drunkard.

"Baron: You used every underhanded newspaper's prerogative in that article to vilify me and the organizati

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also.

"Peterman: So then you did.

"Baron: If, if you would have restricted it to me, you wouldn't be one thing but you even crucified the organization.

"Peterman: Well, that's your opinion. So then you did everything in your power to get even, is that it?

"Baron: I will do what I think I have to do.

"Peterman: All right.

"Baron: If you want to, if your purpose in coming here is that you would like to reestablish our friendly relationship, then put it on that basis. Don't come here criticizing what I have done in the past."

MR. MC GRATH: Then I move over, Judge, on page 14.

"Sal Baron:" -- The bottom of 13. "Sal Baron: Who gave it --

"Peterman: To -- to start with.

"Baron: This is now on the top of page 14.

"I don't know you were gonna try to pin the label on me that I am the fellow that started it because it doesn't happen to be true.

"Peterman: Well I --

"Baron: As a matter of fact, I was accused indirectly and maybe you were not aware of it, when this

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whole question of the original increase came about, first the increase in 1962.

"Peterman: Yah, yah.

"Baron: That Morris Marken was behind me then and it was pretty rumored about that I was on the payroll of Morris Marken.

And then BB, who apparently is Ben Bine, presently deceased.

"BB: And I did some investigating.

"Baron: And I didn't sue anybody. It didn't, didn't annoy me.

"Peterman: Sal, you, well you may have different standards, I don't know, but I have, I have standards that were something like that that is said behind my back and is said to hurt me I don't particularly like.

"Baron: Do you think, do you think that I like to be accused ob being a hireling of Morris Marken.

"Peterman: I mean is that any reason to say that about me?

"Baron: It was said behind the scenes. It was not put in print, so there is nothing I can do about it.

"Peterman: Okay, Sal. I see that this conversation is not --"

MR. MC GRATH: And that's all.

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THE COURT: All right, anything else?

Before I forget it, there was an offer of Plaintiffs' Exhibit 50 and I didn't rule finally on that. I will sustain the objection to Exhibit 50.

Now is there anything else?

MR. WENTZEL: Yes. There was also an offer on Exhibits 52, 53 and 54, which I made in the form of an offer of proof, and advised the Court that I would submit some marked copies. I have copies of those exhibits that are marked and I would like to submit them at this time, your Honor.

THE COURT: All right.

Do you have anything else before you rest?

MR. WENTZEL: No, other than Interstate Commerce matter.

THE COURT: All right, we'll take care of that.

MR. NESSEN: Your Honor, perhaps we can take our mid-afternoon recess and discuss the motions.

THE COURT: Why doesn't the jury retire for a few minutes.

(The jury left the courtroom.)

MR. NESSEN: May it please the Court, your Honor, we did move before to strike certain exhibits and, as a convenience to the Court but in no way waiving our motion

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to strike all the others, we have listed and we have some exhibits that are lawyer-made rather than basic records of Taxi Weekly.

THE COURT: You don't have to cover exhibits now.

MR. NESSEN: I just wanted to give those to you.

THE COURT: Well, I guess before the plaintiff rests they have got to know what exhibits are being stricken.

MR. NESSEN: You are quite right about that, your Honor. I think you really do have to pass upon it.

THE COURT: All right.

MR. NESSEN: May I hand them up to you.

THE COURT: Yes.

MR. NESSEN: The numbers are Defendants' Exhibit X-1 and Y, Plaintiffs' Exhibits --

THE COURT: Can we just have them. I have got to make some time. Just stand here and hand them to me as you describe them and I will rule on them right away.

MR. NESSEN: Okay. Exhibit 28 is created by counsel and reflects supposedly circulation of Taxi Weekly. Its income from circulation and advertising.

Likewise, 29 relates to Taxi Weekly's advertising, a point you understand I don't have to make again.

THE COURT: All right. Now look on 28 and 29, these are these.

MR. NESSEN: X-1 is similar.

THE COURT: Now, what you are saying is, it would be stipulated -- is it correct that these figures were taken from the books and records of Taxi Weekly as they exist?

MR. WENTZEL: Yes, your Honor.

THE COURT: And --

MR. WENTZEL: I brought with Mr. Peterman this morning that they represent the combined totals of Taxi Weekly and Taxi Age.

THE COURT: Okay. And then, just so I am absolutely clear, Mr. Peterman, let me know from you -- you may have testified to this, but these do come from the books and records of Taxi Weekly, right?

MR. PETERMAN: Yes, they do.

THE COURT: Then I will deny the motion to strike.

MR. NESSEN: X-1 is a similar item, your Honor.

THE COURT: The same thing goes for X-1, right?

MR. PETERMAN: Yes.

THE COURT: Motion denied.

MR. NESSEN: 104, your Honor, is Taxi Weekly adjusts that Mr. Kobak used, his calculations.

THE COURT: Let me see 104.

MR. NESSEN: And they are based on what I say is undifferentiated information about Taxi Weekly. Moreover,

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indeed, I think all of Mr. Kobak's testimony ought to be stricken because he wasn't told the truth.

THE COURT: Those motions are denied. That goes to the weight.

MR. NESSEN: I think I would like for you to strike Y in particular, which is taken directly from the books of Taxi Weekly.

THE COURT: Motion denied.

MR. NESSEN: And 42 is a summary of cancellations. We don't know which they are canceling, Taxi Weekly or Taxi Age.

MR. WENTZEL: Is that the cancellation of subscriptions?

MR. NESSEN: Yes.

MR. WENTZEL: On that one where it says "W" it means written.

THE COURT: We have got all the correspondence. Is there a way that I could have a copy of this? I would like a copy of 42. I want to deny the motion to strike, and if I could get a copy of this with the names showing in the upper left-hand corner, I would appreciate it.

MR. NESSEN: We made a motion to strike all sorts of other exhibits, your Honor.

THE COURT: Okay.

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MR. NESSEN: And I understand the ruling is the same.

THE COURT: Well, I don't know what all sorts are at the moment.

MR. NESSEN: Whatever is in the record is in the record.

THE COURT: Okay. Let me just go through quickly. I am going through the marked copies of excerpts of these taped transcripts with non-party persons to see if there is anything that should be admitted, and I will have that in just a minute.

I think you better have, so that your record is clear, the copy with excerpts marked of 52. Let's mark that as 52-A. And the same thing for --

xxx (Plaintiffs' Exhibit 52-A marked for identification.)

THE COURT: -- 54-A. And 53-A.

xxx (Plaintiffs' Exhibits 53-A and 54-A marked for identification.)

THE COURT: Now, Mr. Wentzel has submitted to me Exhibits 52-A, 53-A, 54-A with notations of specific portions of those transcripts to be read, and I sustain the objections to those portions.

Okay. Now is there anything else, are there any

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other motions at this time.

MR. NESSEN: There are motions to dismiss, your Honor, that actually I have a difficult chore and I hate to take up the time at this time to go down each of the defendants.

THE COURT: Why don't you just, if you want to preserve a record, you can simply -- I would not waste time arguing the motions because obviously one doesn't approach this point without thinking of possible motions and I would not want to prevent you from making a record, but I would not be able to grant any motions to dismiss as to your clients, but look, why don't you just move to dismiss.

MR. NESSEN: I move to dismiss, your Honor. I was going to suggest that after the testimony, if you would take ten minutes, there are particular defendants that I would like to focus on.

THE COURT: We might have some motions at the end of the case.

MR. NESSEN: I move to dismiss on behalf of all the defendants I represent, your Honor, and I would like the privilege of also doing it for Mrs. McIntyre who is not here pro se.

THE COURT: All right, all those motions are denied.

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MR. DINKES: If your Honor please, on behalf of my client Levine I move to dismiss on the grounds the plaintiff has wholly failed to make out a prima facie case.

THE COURT: Denied.

MR. DINKES: Exception.

MR. MC GRATH: Your Honor, three groups of defendants. First of all it's UTOG and Sal Baron. I move to dismiss as to both of those defendants on the basis of UTOG there has been absolutely no showing that UTOG itself has a membership corporation in anything. And even if the activities of Sal Baron are shown to have had some part of the conspiracy, there is no showing of agency between Sal Baron and UTOG. There has been absolutely no showing of that on the record at all.

THE COURT: I hate to take time, but I think as to that I reserve decision. Is that okay with you?

MR. MC GRATH: Certainly.

MR. WENTZEL: May I just reply briefly as to UTOG. With respect to UTOG, your Honor, we read portions of the Baron deposition which define very closely the agency relationship between himself and the board of directors and how he acted in response to the wishes of the board of directors of UTOG.

THE COURT: We will go into that a little more

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later. Okay.

MR. MC GRATH: With reference to ITOC and Alfred J. Marks, presently deceased, the same motion are directed to them.

THE COURT: And then you also move on Alfred Zeff.

MR. MC GRATH: And Alfred Zeff and Hosynd Publications.

THE COURT: All right, I will reserve on those. I am not completely clear on those defendants.

Now, there are two defendants that I think maybe should be dismissed, and that's Empire and Taxi Bureau. I haven't heard any reference to those.

MR. WENTZEL: I think that's correct, your Honor.

THE COURT: All right. So the claims against defendants Empire Taxi Bureau are dismissed.

Now just let's take a very short break and put on the defense case.

(Recess.)

(In open court, jury present.)

MR. NESSEN: May it please the Court, your Honor, I would like to call as the first witness for the defendants I represent, I hope I don't have to list them, I am not sure I can at this moment, Mr. Joel Harnett as an expert witness.

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JOEL WILLIAM HARNETT, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NESSEN:

Q Mr. Harnett, where do you live?

A I live in New York City.

Q And what is your present employment?

A I am president and chairman of the board of Media Horizons.

Q And are you president and chairman of the board of any other company?

A I am chief executive officer of a subsidiary of Media Horizons called United Business Publications.

Q What do these two companies do?

A Own and operate a radio broadcasting division and a trade paper publishing company called United Business Publications.

Q How many publications does United Business Publications publish?

A It publishes eleven trade journals, a number of books, and newsletters, and other periodicals in the business paper field.

Q Would you kindly tell the Court and the jury your educational background.

A I am a graduate of the University of Richmond in Virginia, and I did graduate work at the New School for Social Research in New York City.

Q When did you graduate from college?

A 1945.

Q Would you tell us, from the time you graduated college to the present, what field you have been in and then your employment.

A I have been almost entirely in the publishing business during that period.

I worked for the New York Journal American in 1947 and '48 in advertising and circulation.

I then worked for the Dell Publishing Company, which was a magazine publisher. I worked there for two years, '49 and '50.

Then I went to work for Cowles Communications, the publisher of Look and Quick Magazine.

Q Would you keep your voice up, please.

A Yes. I was in charge of marketing for Quick Magazine, no longer published. It was a news magazine of a small size, and I was responsible for drawing up plans for the circulation of this publication and for the selling of advertising for it.

I subsequently, when it was sold, went over to Look Magazine, performed those functions from 1952 to 1968.

I became vice president in charge of marketing for Look, assistant to the president, and I was a member of the executive committee of Look Magazine.

During that period I was responsible for research activity for advertising, planning, circulation, and participated in the publishing decisions of the company.

I was also responsible for the purchase of trade paper advertising on behalf of the company and did research analysis of the various trade papers that we were interested in.

I also developed some new techniques in circulation which are now still widely used in the industry.

Q What is that?

A Means of distributing magazines such as regional editions or demographic editions, special editions of magazine that go to special groups by certain characteristics such as income or age, and generally participated in the discussions about the future of the company.

Q And --

A I also might add that I personally owned a business paper during this period and in that conjunction as a personal side thing bought and sold several of them.

Q When did you leave Cowles and Look?

A I left Cowles in -- announced my intention to leave in 1968.

Q What did you form at that time?

A I formed Media Horizons Company, the company I described.

Q Did you, at this time, put together a group of trade publications?

A Yes.

Q Would you tell the jury about that.

A Yes. I negotiated and bought a company called United Business Publications which at that time was operating eleven different business trade papers, and, as I say, I succeeded in buying it and continue to operate it to this date.

Q Would you give us the names of those trade papers.

A Yes. They include Industrial Photography, Audio Visual Communications, Implant printer, Government Data Systems, Medical Group --

Q Could we have these a little slower, please?

A Yes. Sorry. Industrial Photography, Audio Visual Communications, Biomedical Communications, Law Enforcement Communications, Videography, Vid News, Implant Printer, Reprographics, Government Data Systems --

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Q I think that's enough. What I would like to know is, while at Cowles and Media Horizons, have you participated in the actual purchase and sale of publishing companies or newspapers, trade papers?

A Yes.

Q Would you tell us what they are, please.

A Well, there was one acquisition made in 1966 which took quite a while and I participated in the discussion toward the purchasing of it. It [illegible] called Magazines for Industry.

Q Just give us a list of the names of the companies that you have either bought or sold or participated in in the decision to buy or sell, actually buying and selling of companies.

A I actually purchased a publication called Medical Lab in 1969 for Haire Publishing Company.

I purchased Graphic Science Magazine from the Whitney Publishing Company in 1971.

I recently purchased Vid News from Billboard Publishing Company.

I purchased several newsletters in the mid sixties personally from companies that are now out of business.

Q In the course of being at Look and Cowles and then later Media, did you have opportunity to look at any prospective purchases?

A Yes, I looked at many.

Q How many would you say?

A Well, during that period I would say from 75 to a hundred.

Q Now, would you tell us just briefly how you and the people you have seen in the industry go about evaluating or trying to evaluate companies as they come in, small companies, say under 500,000 of revenue?

A Well, you would look at the growth patterns to see whether or not it is a growing publication.

You would want to know if its advertising is growing and if its circulation income is growing.

You would want to know if the industry it is in is growing in and of itself.

You would want to know whether it's a profitable publication, and if it's a profitable publication, you would want to know what the stability of those profits are. And you would depend upon their continuance. That would be an important thing.

And you would want to know what the fit of that publication is with other publications that you would own or other objective that you might have.

Q As a practical matter, what do you do? How do you go about looking at documents and what documents do you look at when you begin this evaluation?

A Well, you would want to look at financial statements, audited financial statements. You would want to see tax returns. You would want to see audited circulation statements.

Q What are audited circulation statements?

A Well, in the publishing industry, or in the advertising and publishing industry, there is an industry-wide organization, several of them, whose purpose it is to establish the veracity of circulation claims. One of the most prominent is called the Audit Bureau of Circulation, called ABC. It's very well-know being in business 60 years. It was set up in order to provide an independent, objective audit of what the actual circulations are and also to analyze their methods of circulation delivery, and it's a very importand yardstick in establishing the value of a publication. There are others, two, for publications that are distributed free or on a controlled basis.

Q You mean there is another one?

A Yes, called BPA.

Q And for a company that actually sells its wares, ABC is used; is that right?

A Usually ABC is used for those who have a substantial amount of paid circulation.

Q And, what is the importance of checking the circulation and verifying that?

A Well, circulation -- the industry itself, through this agency, sends auditors into the publishing companies and actually on the scene checks circulation and the methods of circulation delivery.

It is perhaps the only objective, independent way to get an idea of exactly how the circulation is occurring.

Q Could you tell us what significance second- and third-class mailings have to trade publications?

A Well, second-class mail is a form of mail which is used by publications with more than 50 percent paid circulation, and --

Q What was it in the sixties, do you know?

A Well, at that time it was higher. And my recollection would be it would be over 60 percent at that time.

Q Go ahead.

A The paid circulation -- the second-class mail provides a faster delivery of the mail and it's widely used by news publications and publications that are timely. It is the form of mailing permit, and it's a permit that has to be applied for at the post office that timely deliverance of a publication would require.

Q What about the price?

A It's cheaper than third-class mail or other forms of mail. Substantially cheaper.

Q Now, Mr. Harnett, did you, at my behest, look at some documents for Taxi Weekly?

A Yes.

Q And what did you look at, sir?

A I saw financial statements, I saw tax revenue reports, and I saw copies of publications.

Q And when did I give that to you, do you recall?

A Oh, it was about eleven days ago, or so.

Q And at the time, did I give you a hypothetical about the circulation of this magazine or Taxi Weekly, the newspaper?

A Yes, you did.

Q Do you recall what that was?

A I believe you told me the circulation was 11,000.

Q And now you have been here on Friday for some of Mr. Kobak's testimony, you were in the courtroom?

A Yes.

Q And you were here this morning during Mr. Peterman's testimony and during the testimony about the emergence of Taxi Age?

A Yes.

Q And had I, prior to Friday, mentioned Taxi Age to you?

A No.

Q Now, having heard this, and having heard that roughly 50 percent of Taxi Weekly went out as Taxi Age, say it's the same save for the heading and minor changes, and having heard read the affidavits that were read and that were published in Taxi Weekly, and being here all morning, you were here during all the testimony; is that correct?

A Yes, sir.

Q Could you evaluate Taxi Weekly and also use, if you will, whatever data I gave you about eleven days ago?

A Evaluate the value of Taxi Weekly?

MR. WENTZEL: Your Honor, may I have a couple of questions on voir dire?

VOIR DIRE EXAMINATION

BY MR. WENTZEL:

Q What were you doing in 1964?

A I was an executive with Cowles Communications.

Q Did you make, did you buy any publishing publications in that time?

A Yes.

Q Which ones?

A I bought a publication called Commercial Atomics eport.

Q What was that?

A It was a newsletter in the business field.

Q A newsletter?

A Yes.

Q And had you bought any newspapers?

A I didn't, no.

Q And had you taken part in any sales or purchases?

THE COURT: You can cross-examine him on this. I thought there was something more directly related to this. Okay. Let's go ahead.

MR. NESSEN: Thank you.

DIRECT EXAMINATION CONT'D

BY MR. NESSEN:

Q I'm sorry, can I impose on the reporter to tell me where I was.

(Record read.)

THE COURT: You were considering all the things that Mr. Nessen mentioned. How would you evaluate the Taxi Weekly, Inc.

A Well, considering everything that I have heard, I would say that the company was -- would have a negligible or possibly a negative value, and I think I should explain that.

Q This is in 1964 we are talking about.

A Yes, in light of everything I have heard.

THE COURT: As of what time?

THE WITNESS: As of '64, in light of what I heard today and Friday.

Q Speaking of 1964?

A Yes.

Q Focus on that.

A The problem here is that to a buyer, I am talking from the point of view of somebody who might buy this publication, you have a very serious question of the nature of the circulation of this publication.

To begin with, it would seem odd that you would have two publications going to such a small market, and that would mean in itself that the value of any one of those names is quite a bit less than if one name was covering all the market because half the market knows it as Taxi Age and the other half as Taxi Weekly.

Then you have the question as to why this is being done and there is a possible reason here that it's being done to circumvent the postal regulations to qualify for second-class mail. If it turns out that there is a fraud or the possibility of a fraud, somebody buying the publication like that would be buying that problem and that would be a very serious thing for him to do on behalf of his investors or stockholders or whatever, whoever was his money source. He would run the risk of besmirching his own reputation if it turned out to be a violation of postal regulations because it might be a criminal problem.

Also he would be faced with the problem of if it turned out that there was misrepresentation of the circulation of the amount or of the method in which it was distributed, this could have repercussions with his advertisers because they had been misrepresented in terms of what the circulation of this publication was.

Also, it might mean that you would have to restructure the whole circulation and go to a more expensive form of distribution, and if you did that, your costs would be quite a bit higher than you thought they would be, and you might incur quite a bit of cost in buying a publication like that, so on that basis I would say it could be negative.

Q Is one of the purposes of doing an audit and circulation and checking circulation to see if there is a problem like this?

A Yes, that's one of the reasons why you have an audit, is to find out exactly what the circulation level is, and exactly what the methods of delivery are, and what the prices being charged for the purpose of circulation are.

Q Do you know of any reputable company in the United States, or indeed, the world, to your knowledge, who would have been interested in Taxi Weekly, Inc. on the facts that you have heard in this courtroom and in the hypothetical question I posed to you?

A I don't, no.

Q Now, suppose a man came to you and said "My circulation is 11,000," and didn't mention Taxi Age, or may have mentioned it in a few minutes, but didn't say that roughly half its circulation was due to Taxi Age under the circumstances we have already posed, would you deal with him?

A Could you repeat that question.

Q Suppose a man came to you and said that my circulation is 11,000. I have a newspaper Taxi Weekly, and I own a Taxi Industry Auto News, and this is it, and doesn't mention to you at first Taxi Age, or, if he did mention it, he mentions it in passing, and then you find out that he failed to tell you that, all about the facts that were developed here in this courtroom; how would you evaluate purchasing a newspaper from him?

A Well, his credibility would be very low. I would be very suspicious.

Q Now, what is the significance of reputation of a publisher? I suppose that goes without saying, but tell us.

A Well, in the trade paper field it's critical because the trade paper depends on a set of relationships between the owner of the publication and the industry and the reputation is essentially what the publication has.

Q Now, I would like you, if you don't mind, to erase particularly what you heard about Taxi Age and all about the affidavits that were put into the postal department, and all about those problems, and take your mind back to the beginning of [illegible] week when first we spoke about Taxi Weekly.

Now --

MR. NESSEN: Ladies and gentlemen of the jury, you will all understand, I am erasing what happened --

THE COURT: Okay. I think we understand. Let's go.

Q Would you tell us, first of all, exactly what the documents, what years you covered for me in looking at documents of Taxi Weekly, and so forth.

A I was given the financial statements for the fiscal year '61 January to March of '61, covers the preceding year, '62, '63, 4, 5 and 6, and tax revenue returns.

Q And you took, you analyzed those?

A Yes.

Q Did you -- well, would you go ahead and tell us the results of your analysis, how you did it, and what you came up with in your own words.

A Well, the analysis shows that the circulation pattern of the publications during the '61, '62, '63, '64 period was in a general downward swing.

The circulation income was about 58,000 in '61. it dropped to 53 in '62, and 42 in '63, and came up slightly in '64 to 44.

Q You can refer to your records if you want to.

A All right. This to me indicates, this is a warning flag that there is a problem in circulation because this determines your reader acceptance of your publication, and obviously there is something wrong. They are declining in circulation revenue.

Then in looking at the advertising income I noticed that there was a flat line here. There was no growth. No essential growth on a trend basis in advertising growth. No essential growth on a trend basis in advertising indicating that their advertising revenue wasn't even keeping pace with inflation. In other words, there was no growth here.

Q Except for one year.

A Except for one year, but you have to look at a three-year trend to be realistic.

Q Mr. Kobak told us you have to look at a three-year trend; is that correct?

A Yes. And that trend indicates that there is no growth. Consequently you don't have an exciting publication from the point of view of growth. In fact, your circulation figures are suspicious and the fact that they can't keep up with inflation indicate that there might be trouble.

You don't, in looking at the bottom line, that is the profit, net profit, there seems to be a very low net profit. There was a profit of several hundred dollars in '62 and '63, and then I believe it was in the neighborhood of $6,000 in '64.

The industry itself, which has to be considered also because you have to view the trends in line of what is happening with the industry, seems to suggest no growth also, the number of medallion cabs did not seem to grow.

Q I gave you an assumption on that, didn't I?

A Yes. You said there were 11,700 cabs, medallion cabs, and that figure seemed to be a constant for many years prior to this period as well. So that suggested this is not a growing industry.

And it's also a geographically circumscribed industry, that is, it's limited in scope, so you have a picture here of a publication which is stagnant or declining in an industry which is not exciting, and it's limited geographically in which there is no profit to talk to.

Q In terms of geography you are talking about Taxi Weekly?

A Yes.

Q The newspaper?

A Yes.

Q And you took a look at Taxi ICdustry, I take it, too?

A I looked at the figures, yes.

Q And what did you see in regard to its circulation income?

A Well, smaller. And it -- I didn't study Taxi Industry with the same care that I put into Taxi Weekly. But it's a smaller publication and the revenues involving circulation are not as significant, I think.

Q And now, it did make a contribution to profit, didn't it?

A Apparently, yes.

Q Now, what other factors did you consider concerning Taxi Weekly in addition to its lack of growth, and small profit, and geographic? Were there any other factors?

A You would have to get into an analysis of how the circulation is distributed.

I was under the impression, I was told that the circulation was distributed primarily through fleet owners, and approximately two-thirds of the circulation was purchased by fleet owners who then distributed it to the taxicab drivers.

That's not -- that type of circulation and redistribution is not unusual in a trade paper field but is always very hazardous to a buyer because the entire publication success hinges on the relationship between the publishing company and those who buy the publication for redistribution.

That's the key relationship in the company and that's why this is a very fragile kind of relationship, and if something comes along to destroy that relationship, then you have an entirely different thing and you don't have the same publication any more. And you have a new set of economics.

Q Would you continue and tell us what conclusions you reached about Taxi Weekly, and then I will put some hypotheticals to you.

A My conclusion was based on the trends, based on the facts of circulation income, decline, based on the nature of the way it was set up, to be distributed, that this publication was worth approximately a little less than book value.

Q Now, I heard an expert say on the stand here that you look at book companies that trade on the diversified companies that trade on the stock exchange, whose stock trades on the stock exchange and over-the-counter, multi-million-dollar companies like McGraw Hill and so forth, and look at the price that they are selling at, and the ratio, and you start with that when you evaluate a company the size of $150,000 volume, what do you think of that?

A I think that's totally unrealistic to look at a company of this size in terms of price earnings ratio.

MR. WENTZEL: Excuse me. I object to that question. I don't think we need the witness commenting on other whites.

THE COURT: Overruled. That's all right.

Q You may answer that.

A I think it's entirely unrealistic in a publication in a company of this small size to apply a price earnings ratio in arriving at a value.

Q Have you ever done it or ever seen anyone do it at Cowles or elsewhere in a company of this size?

A No.

Q In the publishing field.

A I have never seen it done, no.

THE COURT: What did you say, you would evaluate this company at book value?

THE WITNESS: A little less than book value.

THE COURT: I am a little confused. You are talking about just Taxi Weekly, [illegible] or just about Taxi Weekly as a publication?

THE WITNESS: I am talking about the company as an entity.

Q What was that book value?

A It was in the neighborhood of $1[illegible],000.

Q And why would you take a discount? You said a little less than book value?

A Well, you would achieve the book value by liquidation, and there would be expenses involved in doing that.

Q Now, suppose I told you -- and there has been testimony here as a basis for it, and I think the jury understands, your Honor, that as long as there is a basis I am entitled to --

THE COURT: Just ask your question, please.

Q Assume that you were told in 1964, in around July of 1964, that there was bickering between one of the principals, Mr. Peterman, and men in the industry, those who represented the group that was responsible for over two-thirds of the circulation, what effect would that have on your assessment of book value of the company?

A The bickering was of such a nature as to endanger the relationship between them, it's critical. It's bad news here because this publication hinges on the relationship between the fleet owners and the publishers or owners of this company, and if they are bickering, if there is bad blood, or any kind of a dispute, then obviously the relationship is endangered and the company could be wiped out.

Q Now, if I put into the hypothetical an additional factor that Mr. Wysinger and Mr. Peterman were at odds and fighting over policy, if you will, what effect would that have on your thinking in July of 1964 in evaluating this company?

A It would depend on the nature of their dispute. I would think if their dispute had something to do with the policy of the paper that would change it, and therefore affect that relationship, then it would be serious. If it was something personal, it might not be. I don't know.

Q Mr. Kobak has said, and has testified that if you change the formula, the editorial policy of a newspaper, it was like creating a new newspaper. Is that your evaluation?

A Yes, I would agree with that

Q And you wouldn't or would you consider it a going concern in the traditional sense in that case?

A It would be a new operation and with all the risk involved in a new operation.

Q Now, suppose I told you Mr. Harnett, that, in fact, the circulation, indeed I guess I did tell you, that the circulation of this magazine or newspaper was not under contract. Mr. Kobak has said that wouldn't matter to him. What is your opinion about that?

A Well, if we say not have a contract, you mean it's not prepaid.

Q No. It's not signed up. It's a cancellation at will in terms of a legal obligation.

A Well, then I would say that these subscribers are reserving the right to terminate their relationship at any time. Consequently it's obviously not as good as having them under contract where they have paid in advance and they are committed for a fixed term of time.

Q But if they paid in advance, a purchaser however isn't going to get the value of the money that's already been paid; isn't that right?

A If he is paid in advance?

Q Yes.

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A It depends on the nature of the agreement. If it's a guarantee, if it's one of those situations where if you are not happy, you get your money back, then they could ask for a refund, but it doesn't have to be. It can be sold on a prepaid basis, the man buys the subscription and he pays for it and that's it.

Q What is the significance of a prepaid subscription to advertisers?

A Well, the advertiser would at least know that he has circulation over the term of the subscriptions, and in the audited statements, by the way, they show the amount of subscriptions and by the term of subscriptions, so you can see exactly what's paid for what periods of time.

Q You mean the ABC does that?

A Yes, the ABC statement shows that.

Q And that's significant to the would-be purchaser?

A Oh, yes, that would be a primary document for a would-be purchaser.

Q Suppose I told you that the newspaper, one of the editors told the public relations man of the organization of fleet owners that he wasn't going to take any more of his press releases, what effect would that have on your opinion?

THE COURT: Isn't that just again a part -- do we have to get into every detail of every symptom in this field?

MR. NESSEN: No. I will move rapidly. We should be finished in about five minutes. I am terribly sorry.

A Would you rephrase that question or repeat it?

Q I think in view of his Honor's comment, I would like to pass on.

Now, did you see any evidence of any increasing promotional expenses in the financials of Taxi Weekly to counteract the circulation declines?

A No. I looked through that. I charted it and I found no evidence of any increase in circulation, in expenditures, rather, for promotion or advertising or T & E, the normal expenses that you would associate with promotion during this period.

Q And was that important to Taxi Weekly?

A Well, if you were going to contemplate a change in your circulation, or if you felt that you were losing circulation and you wanted to build it, normally you would have a plan to advertise or promote to get circulation, some kind of a plan, and one way it would show would be in expenditures. That would be a very significant way obviously for it to show up. I don't see any evidence that there was any difference in the levels of expenditures

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through the years here in these areas.

Q Would your opinion change if I told you that Mr. Peterman at least prima facie paid $50,000 for a half interest, or 50,000 -- just accept 50,000 and I will make an argument somewhere else, but accept 50,000 or 35,000, or somewhere in between, would that affect your opinion?

A No.

Q Why is that?

A It's his -- he obviously felt it was worth that to him. I can only evaluate within the light of my experience and with my own knowledge of the publishing business.

Q Did you ever hear of a man named Walter Grimms?

A Yes. He is a broker of trade papers.

Q What field?

A Trade paper business.

Q Are there any other?

A I don't know of any other that devote full time to it as he does.

Q Now, if I add to the analysis you did before Friday all the events I spoke of, and you saw in this courtroom, what would be your evaluation as an expert, as a person who is engaged in this field of Taxi Weekly as a business in July of 1964?

THE COURT: Are you asking about the corporation?

MR. NESSEN: Yes.

THE COURT: Can we have the question read back, please.

MR. NESSEN: Why don't I rephrase it, your Honor.

THE COURT: All right.

Q Begin with the evaluation that you made prior to seeing and hearing what went on in this courtroom Friday afternoon and this morning, and then add to it those ingredients, would you now tell the jury what your evaluation of Taxi Weekly was and is as it was in 1964?

A Well, knowing these facts, I don't think any publisher would touch it with a ten-foot pole.

Q Mr. Harnett, I forgot one area, and let me just cover it with you.

Mr. Kobak has testified that he would come in and evaluate this by possibly firing Mr. Wysinger. and firing Mr. Peterman, and putting in someone for $15,000 as a replacement. Is that what happens in the field in which you are in?

A I have never known anything like that to happen. I think that the problem there is that you need somebody who has the managerial skill to hold the whole thing together, and more importantly you need somebody who understands the history and the relationships of the fleet owners and that publication. That's the priceless ingredient in this publication and you can't replace that with any known figure. It might cost you $50,000. But without that you don't have anything.

So I think to say that you can hire somebody for $15,000 who can maintain that publication as it was historically is not at all realistic in view of the close working relationship between the industry and that publication.

MR. NESSEN: I have no further questions, your Honor.

BY THE COURT:

Q That assumes they have a working relationship. Now, assuming for a moment, and I am not trying to indicate a view, I just want to get -- I am a little confused, assuming that you found a situation where there wasn't a satisfactory relationship, then you might try to replace the person, right?

A It might be very difficult, because this is not an unusual thing in a trade paper business.

Q What is not unusual?

A To have a circulation pattern built around a group that buys a lot of subscriptions and then redistributes it to their dealers or customers or whatever it happens to be. And the specific relationship between that person or group that buys those copies and the publisher or the owner of a publication involved gets to be, usually has some historic ties in the industry.

It's built around some advocacy that the individual performed at one time for the industry, a long set of personal relationships that may have developed over the years, it could have been a number of things. It's a very specific thing within an industry. And it's not at all unusual for those relationships to end when a person like that dies, or for some reason steps out of the industry.

Q Then what happens?

A The publication is usually ended or a whole new investment has to be made to rebuild the circulation structure.

THE COURT: Anything else?

MR. NESSEN: No, your Honor.

THE COURT: All right. Now, I have another hearing that I have to get to. Afraid we'll have to ask you to come back tomorrow, but --

MR. NESSEN: I sort of promised him but it's all right.

THE COURT: Well, you have cross, of course.

MR. WENTZEL: Yes, your Honor.

THE COURT: So I can't continue tonight. So what do you have after this witness?

MR. NESSEN: Nothing.

THE COURT: All right.

MR. NESSEN: And we would be ready to sum up.

THE COURT: All right, we will adjourn until --

MR. NESSEN: I'm sorry. Mr. McGrath may have one witness.

MR. MC GRATH: I may, Judge. I will think about it tonight and try to eliminate the necessity for it.

THE COURT: All right. Now, ten o'clock tomorrow.

(The jury left the courtroom.)

THE COURT: I need to take a little time on another case now. Now we finally have to buckle down.

(Discussion off the record.)

(Adjourned to Tuesday, July 15, 1975,
at ten o'clock.)

ebmh

TAXI WEEKLY, INC., et ano

vs.

66 Civ. 2827

METROPOLITAN TAXICAB BOARD
OF TRADE, INC., et al

July 15, 1975
10 a.m.

(Trial resumed.)

(In the robing room; all counsel present.)

THE COURT: Let the record show that we had a long discussion yesterday evening off the record about the basic points of law which would form a foundation for the charge to the jury.

Now, I want to state for the record what I think my final conclusion is. I think there is some modification in what I said last night, but let me just state what I have come up with now.

I have thought overnight about the views of all the parties and I think that there were some points made by everybody which I think were valid and really should be included in the charge. This is the basic ground rule which I would announce to the jury and which I think should be the basis of your arguments to the jury. This is what it is:

Obviously a subscriber has an absolute right to individually cancel a subscription.

He also has a right to discuss with other

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subscribers either in a trade association meeting or otherwise, any disagreement with Taxi Weekly, or Mr. Peterman, any disagreement with the views of Mr. Peterman, or Taxi Weekly as expressed in the paper.

The subscribers, fleet owners or otherwise, have a right to engage in such discussion and indeed it is in the public interest that they do so.

Furthermore, they have a right, following such discussions, to exercise their free and independent right to cancel their subscriptions, and they can do so fully knowing that others are doing the same. And they can advise still others of their views.

Now, what I have emphasized so far, basically, is a free independent exercise of the cancellation rights of subscribers, even though done in consultation with each other and in a discussion with each other. Past that, I believe we can get into the area of illegal conduct.

Now, there are lots of possible types in any given case of illegal conduct, and so to try to define the issues about illegal conduct for the jury here, I would propose to do it as follows:

If a group of fleet owners and other persons, or other persons, go beyond the right of free expression of their views in three independent cancellation of subscriptions,

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and engage in a combination designed to take other action to injure Taxi Weekly, or put it out of business, that would be illegal.

Now, the three possible types of other activities which might be raised in the evidence here would be activities to prevent or to shut off Taxi Weekly's source of news.

Second, activities to shut off Taxi Weekly's advertising.

Now, those are the two things that I think clearly the jury is entitled to consider.

There is a third type of activity which I have considered somewhat hypothetically and I want to raise it, not to create an issue, but just -- well, just to see if there is anything to this to be presented to the jury.

Another possible type of activity in a given case, if there was evidence on it, it seems to me, would be activity designed to force people to cancel subscriptions contrary to their free will, activity under the guise of leadership of a trade association, or activity under the guise of a majority of the trade association, or some other similar activity.

Now, that, I think, in a given case, might be part of a conspiracy, a plan to take action going beyond what I have described as the legal type of doing things.

So, in summary, I think -- I don't know whether this is really what you intended, Mr. Wentzel, but it did come to me that there was validity in your premise that if you had a purpose, and I think you described it as a purpose to destroy the business, there was something there that had to be covered in the case. Now what I have tried to do here is to say that if there was a plan, and if there was a type of action going with that plan, to destroy the business in ways going beyond just free independent cancellation of subscriptions, then I think you have got the illegal area, and I think the jury has something tangible to deal with. It is beyond a kind of hazy state of mind because they would be dealing with whether the plan and activities involved two or three of these types of actions. Okay.

Now, I want to get your comments, everybody, but first of all I have one subsidiary point that I think I asked about but I'm not really sure of the answer. Does the plaintiff contend that the Wysinger attempt to dissolve was part of a conspiracy?

MR. WENTZEL: Yes.

THE COURT: How could you do that? He acted -- he filed his dissolution proceeding June 15th.

MR. WENTZEL: Because there was nothing to it. No one has ever been able to say what this dissolution was about.

THE COURT: But you got the burden of proof.

MR. WENTZEL: Sure. And Mr. Wysinger puts down in the papers that -- of the dissolution that Mr. Peterman was persona non grata with fleet owners, as the reason.

THE COURT: He was.

MR. WENTZEL: He asked Mr. Wysinger and he said no, he had a lot of friends in the industry.

THE COURT: Yes, but what do you have?

MR. WENTZEL: And you say he was. In what respect was he? The editorials in the paper?

THE COURT: It is conclusive that he was persona non grata, otherwise he wouldn't have done what you charged.

MR. WENTZEL: Mr. Botwinick and the leaders of Metropolitan, but not the industry.

THE COURT: But the burden of proof is on you to show that Wysinger was acting pursuant to a conspiracy. Now that's a serious charge, and you just -- you know, you have got to prove it. I don't recall one ounce of evidence from which this jury could decide that Wysinger was put up to this, or urged to do this, or induced to do this, or whatever you want to say by any of the defendants here.

MR. WENTZEL: Except that Mr. Botwinick knew about it a month before it happened.

THE COURT: Where is the evidence of that?

MR. WENTZEL: Mr. Peterman so testified as to his conversation with Mr. Botwinick when he told him --

THE COURT: But there was a disagreement, not that there was a plan to dissolve.

MR. WENTZEL: The first time Mr. Peterman ever heard of it.

THE COURT: That strains credibility. That is just naivete beyond anything that I can imagine.

The evidence is virtually conclusive that there was indeed a disagreement between Wysinger and Mr. Peterman.

MR. WENTZEL: There was a dissolution proceeding.

THE COURT: And there was a disagreement before that, and despite any denial by Mr. Peterman, I think that is just impossible to believe.

MR. WENTZEL: It is not only denied by Mr. Peterman, but is denied by Mr. Wysinger.

THE COURT: There is a very strong affirmation of disagreement that Mr. Peterman's policies were directly against my policies, that kind of thing?

MR. WENTZEL: No one was ever able to explain the how or why. And you read the paper. I have read that paper from cover to cover and I sure can't see it.

THE COURT: Okay. All right. But you claim, regardless, that another activity of the conspiracy was inducing Wysinger to try to dissolve, right?

MR. WENTZEL: Yes.

THE COURT: Do you claim -- okay, now do you have any comments on what I have said?

MR. WENTZEL: Yes. I think I have expressed this before, I'm not sure whether it was on the record or in off the record conversations, but my view has been that where the design of the defendants is one to coerce a party into a hearing to be used, of the defendants, by taking action or in action that the defendants wish that party to take, that in that situation, a boycott arising out of that attempt to coerce is per se illegal.

THE COURT: You mean just a consensus of decisions or however you want to say it, to withdraw their subscriptions?

MR. WENTZEL: No. More than that.

THE COURT: I don't discern -- I am trying to discern what the difference is in your proposal from what I have proposed. Is there a difference?

MR. WENTZEL: Yes.

THE COURT: What is that difference?

MR. WENTZEL: What I am saying is that where the defendants attempt to coerce the newspaper to follow their views, so that they can dictate its policy, and as part of that plan of coercion, when the newspaper refuses, they then cancel their subscriptions --

THE COURT: Where is the evidence of that?

MR. WENTZEL: Again the conversation between Mr. Peterman and Mr. Botwinick.

THE COURT: What did Botwinick say?

MR. WENTZEL: He said he wanted Taxi Weekly to be a crusader like the old days. He wanted them to attack Morris Marken and a whole series of things that Mr. Peterman recited about that conversation.

THE COURT: What is the whole series of things? That's all, isn't it? Attack Marken?

MR. WENTZEL: You said you have got to come out stronger for the fleet position on the fare increase. Well Taxi Weekly was also straight on the line supporting the fare increase and all that being meant by that would be do not report anybody else's views.

THE COURT: Okay. I won't -- okay. I won't charge that. It seems to me that before you can have somebody liable for violation of the Sherman Act, which is both a receiver civil penalty and a potential criminal penalty if the Government decides to bring a case, there has to be something discernible, tangible that somebody does to cross the line between legal and illegal conduct.

Now, I believe, and we have all sweated over this and it is very debatable about exactly how to charge, I don't deny that for a minute, but I believe that I am unwilling to charge in your terms, first of all because I think that the evidence -- first of all, I believe that the fleet owners had a very important constitutional right to have different views from those of Mr. Peterman, and they had a right, under the Constitution, to discuss those difference of views, and they had a right, a very important right to cancel their subscriptions fully knowing that it might hurt the paper, and they had a right to do it because they didn't like his views.

MR. WENTZEL: Just so long as each one exercises that right independently.

THE COURT: Well, I differ with you to the extent that I have stated.

MR. WENTZEL: May I just note an exception for the record since this involves jury charges?

MR. NESSEN: I think the exceptions can come after your charge.

MR. WENTZEL: I don't want there to be any waiver here.

MR. NESSEN: I except to it too.

THE COURT: All right. Now, the line between what I feel is legal and constitutionally protected conduct here, and what you say, I think in this case, is such a gray hazy line that I don't think that it would be possible and fair to a defendant to say that he crossed over the line because he went and asked the paper to publish a particular view. I think he's got a right to do that.

So I think that what you just described to me doesn't fall into the area of illegal anti-trust conduct, and I will -- I will stick to what I just said.

But I do want to know this: Granting the rule that I have expressed, that you get into the area of illegal conduct, only if and when you plan to take actions beyond the mere free exercise of the right to cancel, and you plan to take additional actions designed to directly hamper or destroy Taxi Weekly's business, I want to know what actions you suggest I put in where the issues are raised by the evidence here. Certainly the attempt to get a withdrawal of advertising would be one, right?

MR. WENTZEL: You referred to the shutting off of advertising. Our view of that is that it took two forms.

THE COURT: Okay, I will cover two forms. In other words, the pressure, economic pressure, and the other is spreading the false rumor about Marken. Okay, I will charge on that.

Then the plan to shut off news sources, right?

MR. WENTZEL: Yes.

THE COURT: Now, you would also want to include in there the conspiracy too of Wysinger breaking up the company, right?

MR. WENTZEL: Yes.

THE COURT: Anything else?

MR. WENTZEL: Well, there is testimony here that -- this is sort of a continuing nature of the conspiracy, when Peterman went back to hold conversations with them they were unwilling independently to rescribe unless he first went to Botwinick, and the then administrative director of Metropolitan, Mr. Saul Peter, and worked it out with them first. Well, there, that's really in the area where you said forcing people to cancel contrary to their own independent views, but it is also forcing people not to come back.

THE COURT: So you would want to be able to discuss that with the jury?

MR. WENTZEL: Yes.

THE COURT: All right, what are your views?

MR. NESSEN: Let me start with the last one first, your Honor.

I don't see, particularly in view of the earlier motion papers in this case describing what Mr. Peterman was about, that he could go in and, with the secret aim of getting evidence, and then proclaim as he did in each case if he is coming to see if he could make piece. The evidence is clear, people tell him why don't you see this fellow, or that fellow, he is a charitable person, or go up and see what you can do with it.

THE COURT: Isn't that a matter of weight?

MR. NESSEN: Well, it is a matter of argument, your Honor.

THE COURT: I think it is a matter of argument.

I think what I have really -- basically one point of trying to structure the charge in a way I have as to really permit the whole case to be presented to the jury and not cut it off artificially and distort it.

On all these points there are very, very serious questions of weight, and the whole pattern of how these cancellations came about, five of them come out, now five out of 72 or 75 fleet owners, now I don't think, or I don't know that it is even in the record, but I would be interested if I were on the jury to know not merely just in terms of dollar amounts but how many people were involved, and I tried to figure that out over the weekend and we didn't have enough information, but all of these things, there are very serious questions of weight, but it is a matter for you two people to argue the weight.

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MR. NESSEN: Certainly if you are going to argue the contention, our contention, of course, is that you would have to explain fully as the evidence shows that was read into the record --

THE COURT: Well, that's up to you initially. I will do some summarizing of the evidence but that's up to counsel. That's why I want to make it very clear to you, I mean, the extent that you can talk about.

MR. NESSEN: Now, as to your various points, your Honor, I think that it is wholly within the constitutional rights, for example, for each one of these defendants to have voiced strongly his opinion to Mr. Peterman in front of anybody they wanted to, and that includes advertisers, potential advertisers, or the people associated with Rockwell who weren't really involved in advertising but it does seem to me that they could voice their view and say and proclaim we don't like Peterman, we are unhappy with his views.

THE COURT: Okay. I am going to still charge on that. I get your point.

MR. NESSEN: Your Honor, I also feel that the question of how you phrase this, which I understand is tentative, will be crucial. I have suggested ways of doing it and I would like to adhere to that. I urge you not to be as vague, I find Mr. Wentzel's proposals always a little vague. Maybe that's the law, but it is awfully hard for me to grasp. It seems to me that there not only has to be intent but there have to be actions taken.

THE COURT: Well the reason that I want to emphasize -- the thing that has come to me as a way to get it past an impossible vague charge is to emphasize the types of actions specifically that could execute an illegal conduct.

Now, obviously you don't have -- let's suppose that there was a plan to put Mr. Peterman out of business by doing four things: One, getting his source of news shut off. Two, getting his advertising cut off. Three, getting, putting economic pressure on or some kind of pressure on other subscribers. Four, getting Wysinger to move to dissolve. That is, you know, it wouldn't be four little conspiracies but it would be an overall conspiracy manifested by plans and activities that I would specify. At least that's the way we can get it past a vague situation.

MR. NESSEN: I don't think there is any evidence, indeed, Wysinger's testimony yesterday read in was pretty clear that there was really no connection between the Wysinger dispute and the conspiracy here other than the fact that there was known in the industry that they were bickering. Wysinger denied it. There is really no competent evidence in any way. I don't think there is anything to go to the jury on that.

And I am very disturbed by the notion, it depends on how you translate it, your Honor, that we had to have Mr. Peterman at Metropolitan meetings or that anybody else --

THE COURT: Again, this is a matter for argument, and if there was a plan to shut off his news sources, and if the refusals of interviews and invitations to meetings was pursuant to that plan, then that is something I think you can argue to the jury. And again it is a matter for weight and the lawyers simply have to tackle that problem of what the evidence really means. Mr. Wentzel has his side and you will have your side.

The matter of Wysinger probably -- I don't like to submit anything to the jury which is pure speculation, and I think the Wysinger thing falls in that category. I think that's so outlandish I just -- give me a minute to think about that. I'm really a little surprised that that connection is still made.

MR. NESSEN: Your Honor, can I protect the record on something that I didn't do and I would like agreement from all.

At the close of the plaintiff's case I intended to and I am not sure that I made the right sounds. I really wanted to move for a directed verdict and I am not sure I used the words "directed verdict."

THE COURT: All right. That motion is denied.

MR. NESSEN: But retroactively, is that?

THE COURT: Yes.

MR. McGRATH: That I have it, the same motion?

THE COURT: Yes, denied.

MR. NESSEN: The rule requires stating specific grounds. I take it that you know what my grounds are, no conspiracy was proved.

THE COURT: I am not pressuring you by not stating your grounds. I think I told you that the decision is reserved so let's not go over that again.

Okay, now, one other point you brought up last night about causation. Judge Weinfell's charge which you were referring to has this about causation and I would like to see if everybody agrees to this. In his charge in Mercury Industries against General Electric, 68 Civil 944 tried in 1973 he said, "The fact of injury must be proved with reasonable certainty. An injury or damage is approximately caused by an act whenever it appears from the evidence that the act played a substantial part in bringing about the injury or damage, that the injury or damage was a direct result or a reasonable probable consequence of the act. If the injury was caused by reasons other than defendant's

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illegal conduct, then plaintiff cannot recover. If you should find from a preponderance of the evidence in the case the damage to plaintiff's business and property such as --" well, "damage to plaintiff's business and properties was approximately caused by the defendant's illegal conduct complained of, then the circumstances that the precise amount of plaintiff's damages may be difficult to ascertain shouldn't affect plaintiff's recovery and so forth."

But the crucial language is, "An injury or damage is approximately caused by an act whenever it appears from the evidence that the act played a substantial part in bringing about the injury or damage, that the injury or damage was a direct result or reasonable probable consequence of the act. If the injury was caused by reasons other than defendant's illegal conduct then plaintiff cannot recover."

Is that acceptable to you, Mr. Wentzel?

MR. WENTZEL: Yes, I think that's proper language.

THE COURT: Mr. Nessen?

MR. NESSEN: No, your Honor. I do think that it is not quite what I had in mind in request to charge 73, 74, 75.

THE COURT: You referred me to Judge Weinfell's charge.

MR. NESSEN: Yes, 76. I am not sure your Honor that my reference to Judge Weinfell, that that covers the field completely, and I'm not sure that what you said I really didn't take notes unfortunately.

THE COURT: Why don't you read it. The reason I read it was to have you hear it.

(Pause.)

THE COURT: Have you got Mr. Nessen's charge, paragraph 73 particularly?

MR. WENTZEL: Yes, sir.

THE COURT: Do you have any comments on that, Mr. Wentzel? I would think that the law about what you should say on causation would be perfectly clear and we shouldn't have any disagreement about it.

MR. WENTZEL: I think the Weinfell charge is very close to 73 but I just don't think it goes far enough.

THE COURT: You have some other things. What do you say about his 73, Mr. Wentzel?

MR. WENTZEL: Well, your Honor, I would disagree with some of the words that are used.

THE COURT: What words?

MR. WENTZEL: Well, the defendants are entitled to win and --

THE COURT: Let's cut that last sentence. The real crucial thing is -- the crucial language of Mr. Nessen is in the first three sentences of 73. Now look at those

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carefully, if you could, and see if we can get some agreement on it.

MR. WENTZEL: Your Honor, my reaction to it is that while this contains the classic but for language, it seems to me the proper anti-trust charge here is the one that you just recited where the act complained of played a substantial part in bringing about the injury.

Have you looked up any cases?

THE COURT: Did you give me a charge on this?

MR. WENTZEL: I should have if I didn't. I hope I did.

MR. NESSEN: This is largely adopted from the judicial conference charge, your Honor.

THE COURT: I don't think there is anything about causation here. In paragraph 19 you say something about damages. You have "must be established as a direct and identifiable result."

MR. WENTZEL: Right. Identifiable direct and substantial cause of the damage.

THE COURT: You have the substantial basically the -- your paragraph 18 is like the Weinfell charge, right?

MR. WENTZEL: Yes. I didn't have the Weinfell charge in front of me at the time specifically.

THE COURT: And you got this from the pattern in

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anti-trust structures?

MR. WENTZEL: Yes, the ABA anti-trust section charges.

THE COURT: Where did you get yours, Mr. Nessen?

MR. NESSEN: From the judicial conference charge, and I am sure from the ABA.

THE COURT: Okay, we'll look at those and try to resolve this. I don't think I need to know the precise language before you sum up.

In our long discussion last night I didn't attempt to go through one by one the defendant's and the plaintiff's requests to charge and rule on them individually.

I think it has been more fruitful to discuss the crucial points. Obviously, if after the proof is all in and before you sum up you need to know about any specific other questions as far as the charge is concerned, why don't you ask that. Otherwise I don't think that would be terribly useful to run through as a matter of routine all those requests.

MR. WENTZEL: I think I have a feeling or an understanding of where you are going in your charge, your Honor.

I am concerned about protecting the record insofar as having requested certain charges as I am sure Mr. Nessen is

Perhaps at some point there ought to be rulings on them rather than just have us scrambling at our decision.

MR. NESSEN: What he is suggesting is, what the Judge is suggesting is he doesn't have to do it before our summations and I certainly will waive that, your Honor, and will take exception to your charges at the end.

THE COURT: I don't want to deprive you of your record and I think we can figure out a way to indicate the distinction between what you want and what I charge. We'll do that.

MR. NESSEN: Could we just one minute, the plan of operation? Summations today. Do you think you are going to charge?

THE COURT: I will charge at 9:30 tomorrow.

MR. NESSEN: It is too much for them to get in one day.

THE COURT: Yes. That's not a good idea.

Now, I want to be able to say to the jury that I have dismissed the case against Nathan Levine because they want to know why Mr. Dinkes isn't here, and I will put on the record, Mr. Dinkes last night, in our long discussion, raised again -- it was raised, I don't know who raised it first, but the question of whether the plaintiff had made out a case against Nathan Levine now represented by his estate, and I ruled that the plaintiff hadn't made out a case, and that the action would be dismissed as against Nathan Levine and his estate.

The basic reason is that I have a feeling that the evidence has proved nothing whatever in the way of Mr. Levine being a member of a conspiracy to do any of the things that I have discussed as being illegal. The only evidence is that he cancelled the subscription in November 1964 which is something that shouldn't under any stretch of the imagination give rise to an anti-trust, against anybody. To the extent he was present at meetings at that time, is no indication that he was involved in any conspiratorial plan or activity in such meetings, and he is out of the case.

I think there also we discussed the situation as to Alfred Marks. Now, as I understand it, the only activity alleged now against Alfred Marks is that he urged his organization~~,~~ LOMTO, to stop helping Mr. Peterman get subscriptions of the members and that LOMTO cancelled its subscriptions, but that was back in February 1964, wasn't it Mr. Peterman?

MR. PETERMAN: February or March.

THE COURT: February or March 1964. The undisputed testimony is that the reason he did that, was that Mr. Peterman went and attempted to coerce LOMTO into getting paid subscriptions for the members.

Mr. Marks said it was also at the ITOC meeting on July 13th but there is no indication that he engaged in any plan, or that he was party to a plan, was party to any discussions of a plan at that time to harm Mr. Peterman or Taxi Weekly, nor is there any indication of any activity thereafter.

MR. WENTZEL: Your Honor, there is one thing there. October 1964.

THE COURT: What did Alfred Marks do in October?

MR. WENTZEL: There is an issue or evidence on the point of withholding news. Mr. Peterman testified that he refused to give Mr. Peterman ITOC's story on UTOG's withdrawal from that organization.

MR. McGRATH: That was not the testimony, most respectfully. It was that he would refuse to give him a statement when requested.

MR. WENTZEL: Yes.

MR. McGRATH: On the LOMTO position. LOMTO is not a party defendant. LOMTO is not in this case at all.

MR. WENTZEL: That wasn't my understanding.

THE COURT: Well, I had missed that and I'm sorry. I thought I had gotten all the references to shutting off news, and I have got a reference to --

MR. McGRATH: Baron excluded -- it is Mr. Peterman's contention --

THE COURT: I have got my notes and it may be incomplete that Mr. Peterman testified that Mr. Botwinick wouldn't talk to him in the fall of '64 about unionization, Milton Marks wouldn't talk to him, Benny Tar wouldn't talk to him, Rautenberg wouldn't talk to him, Schaffran wouldn't talk to him, he was not invited to MTBT meetings, he was refused entry into a UTOG meeting.

MR. PETERMAN: Your Honor, was not Milton Marks, it was Alfred Marks.

THE COURT: That wouldn't talk to you?

MR. PETERMAN: Is that right?

THE COURT: Is that your testimony?

MR. PETERMAN: That's right. And it is in the issues of 1964 of Taxi Weekly that are in evidence.

MR. NESSEN: Where is that testimony? We have very exact notes, your Honor, that Mrs. Pomsey took, if you can tell us the sequence that that happened. Was it on direct examination?

MR. McGRATH: I will concede that Judge it was Alfred Marks who refused to give him a statement and that Mr. Peterman so testified, and it was in that general area.

THE COURT: Well, it is about as slender a connection as one can dream up and I guess maybe you will have to argue the weight on that. I will leave him out.

And the other thing I said you would -- in other words, I will deny the motion to dismiss as to Alfred Marks. The motion is granted as to Nathan Levine and his estate.

The other point I said I would tell you about for the sake of your discussion with the jury, I will instruct the jury about the contention of the plaintiff that the dissolution proceeding of Wysinger was pursuant to a conspiracy and I will permit discussion of that to the jury.

Okay, I think we are set.

MR. WENTZEL: May I mention to the jury the difference in the value of the dollar from 1964 to the present, your Honor?

THE COURT: No, you may not.

MR. WENTZEL: I respectfully except to that. I would also like to note an exception to the dismissal of Mr. Levine on the record.

(In open court; jury present.)

THE COURT: I think at some point during the day there may be some school children coming in. One of the Circuit Judges, Judge Moore called my office yesterday, so they will be coming in, and if you don't mind I will just explain very briefly the nature of the case to them.

Now, I think we had the witness on the stand who is to be cross examined today.

At one of our repeated discussions about matters of law, procedure and so forth, we have been engaging in with the lawyers, I have determined that the claim against Nathan Levine and his estate should be dismissed for reasons peculiar to that particular claim and that particular defendant, so Mr. Dinkes you will not see henceforth and you will not consider any claim obviously against Nathan Levine. That is to have no bearing whatever for or against any other claims. They are still until further notice in the case. Okay.

JOEL HARNETT, resumed.

CROSS-EXAMINATION

BY MR. WENTZEL:

Q Mr. Harnett, would you tell me again what years you were employed by Cowles Communications?

A 1950 through 1968.

Q And you testified on your direct examination that you purchased something called Medical Lab at one time?

A That's correct.

Q What is that?

A A trade publication.

Q For what industry?

A For the medical laboratory industry.

Q And you referred to something about Graphic Science

A That's correct.

Q What is that?

A A trade paper.

Q In what industry?

A It is in the graphics industry.

Q When were those acquisitions?

A 1969 to 1970.

Q Did you testify that you were involved in any purchases of trade publications while you were with Cowles?

A Yes.

Q What were they?

A Magazines for Industry.

Q Is that the name of something?

A It is the name of a company that publishes trade magazines.

Q What kind of trade magazines do they publish?

A They are magazines that are distributed in the paper industry and packaging.

Q You were in the marketing department of Cowles; is that right?

A I was vice president in charge of marketing and assistant to the president of Look Magazine.

Q When Cowles made acquisitions of trade publications, did you do the financial analysis of those companies?

A No.

Q Who did?

A The business manager. He was the president of the company.

Q Do you have any training in accounting yourself?

A No.

Q Did Cowles, during the 1960's, have any trade publications with total revenues of under $200,000?

A During the 1960's?

Q Yes.

A Yes.

Q What were they?

A They were some of the publications of this company.

Q Can you identify any of those?

A I can't recall specifically the names. There were quite a few of them.

THE COURT: That Cowles owned?

THE WITNESS: Yes.

Q Were any of them involved in the automotive industry?

A I don't believe so.

Q Were they involved in the transportation business?

A No.

Q Was it your testimony that this ABC organization audits all trade publications?

A No. I said they audit trade publications.

Q Was that a regular thing for all trade publications, that they were audited by this organization?

A It was very desirable.

Q How about companies having revenues of $150,000 or so a year, in your experience as it a normal thing for such companies to be audited by ABC?

A Yes. It frequently happens; yes.

Q Can you identify any companies in that magnitude of revenues that you recall?

A Of 150 or less?

Q Yes.

A Taxi Industry was audited by ABC and had had a revenue of 40,000.

Q Taxi Industry?

A Yes.

Q Are you referring to the magazine that's concerned in this case?

A Yes.

Q Do you know what the result of that audit was?

A It was audited by ABC in 1961 and '62 and then dropped out.

Q My question was, do you know what the result of that audit was?

A No. I did not see the audit. I called ABC to check whether they were audited.

Q Did they tell you there was any claim of fraud, or anything like that?

A I didn't ask.

Q That wasn't something you were interested in?

A No. I was really trying to find out whether they were audited.

Q You mentioned a number of factors that you considere in evaluating a company, a trade publication. Are the advertising revenues such a factor?

A Yes.

Q And when you examined the -- incidentally, what financial statements of Taxi Weekly did you examine?

A I was given the financial reports, which I have here, prepared by Louis J. Graham, called Taxi Weekly, Incorporated financial report for the fiscal years '61 through '66.

Q Did you base your opinion upon those reports?

A I had the income tax reports and I had these financial reports and I based my analysis for advertising revenues based on those documents.

Q Did you base your opinion on -- well, as of what date is your opinion as to the evaluation of Taxi Weekly?

What is the time frame that you were given when you gave an opinion on your direct examination?

A It would be based on the trend from '61 through '64, financial '64.

Q So you were speaking as of the end of March of 1964?

A Yes.

Q For what purpose did you consider the review of financial statements for 1965 and 1966?

A For what purpose?

Q Yes.

A I was given the statements and asked to study them and I did.

Q Did they form a part of your opinion as to the value in March of 1964?

A No.

Q Did you observe that the Taxi Weekly advertising revenues for the newspaper were at an all time high for the year ending March 1964?

A Yes.

Q Did you examine the quarter that ended June 30, 1964?

A Yes, I believe I saw that.

Q Did you compare that with the quarter ending June 30, 1963?

A Not specifically.

Q Not specifically?

A Not specifically.

Q Does that mean not at all?

A Well, I reviewed all the financial statements.

Q That you were given?

A Yes.

Q Were you given that one?

A Yes, I was.

Q But you don't recall making any specific comparison with the quarter ending June 30, 1964 and the quarter ending June 30, 1963; is that correct?

A I made specific comparisons on an operating analysis basis of June 30, 1963 versus June 30, 1964 to check the pattern of expenditures and I charted them. I have them here.

Q The pattern of expenditures?

A Yes. For example, promotion, advertising convex expenses, circulation expenses, mailing lists, postage and so forth.

Q Did you make such an analysis to check anything else? Advertising revenues, circulation?

A Yes. I made a table which I have here on a -- using gross advertising revenue and circulation income which I charted on an annual basis from fiscal 3/31/61 through 3/31/66 in which I broke down Taxi Weekly by year, Taxi Industry by year, and the total in order to determine the pattern of advertising income over a period of years and I did the same with the circulation income.

Q My question was did you do it for the quarter ending June 30, 1964 and compare it with the quarter ending June 30, 1963?

A I didn't make that specific comparison.

Q Did you make any comparison of Taxi Weekly's growth in advertising revenues with the rest of the publishing industry?

A Well, my experience would be that that was a period of strong growth in the publishing business.

Q What were the figures?

A I don't recall the specific figures.

Q Do you know whether Taxi Weekly's increase in advertising revenue was better than the rest of the industry on the average?

A I would say that the Taxi Industry's performance during this period in the sixties showed a pattern of no growth during the period of the years that I tracked it, and that this was contrary to the experience in the publishing business at this time.

THE COURT: Wait a minute.

There was strong growth in the publishing business in what, advertising revenues?

THE WITNESS: Yes, sir.

THE COURT: And you said in your last answer something about Taxi Industry being no growth?

THE WITNESS: I'm sorry. Taxi Weekly I believe it was.

THE COURT: What is it you are telling us about now?

THE WITNESS: What I am saying is that the pattern of advertising growth in Taxi Weekly was flat, relatively flat during the period I tracked it, whereas this was a period of good growth in advertising revenue in the publishing industry generally.

BY MR. WENTZEL:

Q What was the percentage of growth in the industry generally?

A I can't recall the exact percentage.

Q Did you get out the figures and look at them?

A No.

Q Did you make any calculation at all to compare Taxi Weekly with the rest of the industry?

A No.

Q You said you looked at the copies of the paper; is that correct?

A Yes.

Q And did you look at the types of advertising it was carrying?

A Yes.

Q Did you look to see whether there were any growth in particular types of advertising in the years you were examining?

A No.

Q That wasn't of concern to you?

A No.

Q Did you observe the profits before owners' salary reflected on the financial statements?

A I saw them.

Q Did you make any effort to determine whether some part of that was attributable to salary and some part attributable to profit?

A No.

Q Do you know what the weekly salaries of Mr. Wysinger and Mr. Peterman were?

A They were on the financial statements.

Q The weekly salaries?

A Weekly?

Q Yes.

A I have the salaries as reported on the financial statement.

Q I am asking you whether you knew what the weekly salaries were?

A No.

Q Did you make any effort to find out?

A No.

Q Were you aware that the corporation had a tax status the same as a partnership?

A No.

Q Do you know how to value a partnership?

A No.

Q Now you said one of the factors that you examined was it the fit of the paper for a particular buyer; is that right?

A That's correct.

Q Now, in your experience with Cowles back in the 1960's you have already told us you didn't have any trade papers in transportation or automotive fields; is that right?

A That's correct.

Q So would it be fair to assume that Taxi Weekly wouldn't be a good fit for Cowles?

A That's correct.

Q Now, the fact that a publication is not a good fit for a single organization like Cowles doesn't mean it wouldn't fit somewhere else, does it?

A Correct.

Q Incidentally, when were you retained to testify here?

A Approximately two weeks ago.

Q Are you being paid?

A Yes.

Q Now, you testified about some hypotheticals that Mr. Nessen gave you. One of them I think was he asked you to assume that the two owners of the company, Mr. Peterman and Mr. Wysinger were at odds with each other. You don't know one way or the other whether they actually were at odds, do you?

A No.

Q And was it your testimony that whether a dispute, if it existed, would affect the value of the company would depend on whether that dispute had some affect on the policy of the newspaper?

A Yes.

Q Now, did you, in reading the copies of the newspaper you were given, observe any change in policy prior to July 1, 1964?

A I did not study the papers to determine whether there was a change of policy or not.

Q In other words, you didn't observe anything?

MR. NESSEN: I don't think that is his testimony.

THE COURT: Yes.

Q Did you observe that?

A I did not attempt to study it.

THE COURT: He said he didn't study that with that in view. That's a matter that you are going to have to prove otherwise.

Q Now, there were also -- you also mentioned something about fraud in your direct testimony. Was that some sort of an assumption that you were making?

A Yes.

Q Do you know whether it was true or not?

A Well, the question was asked, as I recall, in the context of assuming that everything I have heard Friday and yesterday, there was a fraud to my ears in the sense that I heard that there was a false affidavit given.

Q When?

A In the circulation statement that appeared in '65.

Q In 1965?

A Yes.

Q Are you telling us now that what happened in 1965 formed the basis for your opinion of the company as of 1964?

A No, not at all.

Q Do you have any information that any of the circulation figures in 1964 were incorrect?

A Well, based on what I heard in the last two days I do, yes.

Q What is that information?

THE COURT: We are going to get into a morass. The witness was not called as a fact witness. He was called as a witness to express opinions based on facts which your side and Mr. Nessen's side and Mr. McGrath's side are disputing. And that's all he is here for.

Q Now, you testified, Mr. Harnett, that you did not study the magazine, Taxi Industry Auto Rentals News, with the same care as you studied the newspaper Taxi Weekly; is that correct?

A Yes.

Q Did your evaluation of Taxi Weekly include any evaluation of the magazine?

A I'm not sure I understand your question.

Q What were you evaluating when you testified in response to Mr. Nessen's questions?

A I was evaluating the financials, the Taxi Weekly company financials that were given to me, and I was particularly interested in Taxi Weekly. Therefore I looked at the copies of Taxi Weekly.

Q But you know that there was a newspaper and a magazine, two separate publications?

A That's right.

Q Were you evaluating just the newspaper?

A No.

Q You were evaluating the entire corporation?

A That's correct.

Q Did you study the growth of the Taxi Industry Auto Rentals News was engaged in?

A I did look at the figures.

Q The industry figures?

A You mean the publication or the industry as a whole?

Q The industry as a whole?

A I was given figures on the growth of the industry, yes.

Tell me what industry it was engaged in that you got these figures on?

A I got the figures on the growth of Medallion Cabs, the number of Medallion Cabs during this period and prior to it, and the number of fleet owners.

Q You are talking about the growth of the industry that the newspaper was engaged in, right?

A Right.

Q Did you make any examination as to the growth of the inudstry that the magazine was engaged in?

A Not specifically to industry.

THE COURT: The magazine industry? What industry are you talking about?

MR. WENTZEL: I am trying to find out what he did examine. We have had testimony that the magazine was circulated --

THE COURT: He told you he got figures about the growth of Medallion Cabs.

MR. WENTZEL: Yes.

THE COURT: What other industry are you asking him about?

MR. WENTZEL: The industry to which the magazine was directed as opposed to the newspaper.

BY MR. WENTZEL:

Q But you did not examine that; is that correct?

A I did not examine specifically that industry.

THE COURT: When you say that industry, what do you understand Mr. Wentzel to be talking about and what are you talking about?

THE WITNESS: I assume that what he is talking about is the Taxi Weekly was a geographically limited publication to the New York area whereas the magazine was nationally distributed, and I assume --

THE COURT: And you got figures about New York City as far as cab growth or whatever?

THE WITNESS: Yes, the number of Medallion cabs. But I received no industry information nationally.

Q Did you receive any information to just to whom the monthly magazine was distributed?

A I don't specifically recall that.

MR. WENTZEL: I have no further questions.

THE COURT: Mr. McGrath, do you have anything?

MR. McGRATH: Very briefly, Judge.

CROSS-EXAMINATION

BY MR. McGRATH:

Q Mr. Harnett, I believe you told us that you we here during the testimony in part of Mr. Kobak?

A Yes.

Q And do you recall hearing a hypothetical posed to him? I will withdraw the question. It is unimportant.

I want you to assume some facts that are in he record, if you will, and then I am going to ask you whether or not you have an opinion.

I ask you to consider all of the facts and figures that were given to you or that you learned concerned Taxi Weekly, and I ask you to add to that three assumptions. The first is that the two principals of the corporation were engaged in a bitter dispute, or were bickering, and that both of these principals were active members of the corporation.

The second fact I ask you to assume is that one of the principals was also bickering with the industry, the taxi fleet industry, which was the principle source of the circulation and because of the circulation and the advertising.

And thirdly, I ask you to assume that the circulation figures that were given by the principal of the corporation were in the least suspect.

Now, taking all those facts that you know and those additional assumptions, do you have an opinion as to the value of this publication?

A Of this Taxi Weekly?

Q Yes.

A I want to make sure I understand the question. What are you assuming that I know? What has been in court in the last two days?

Q Plus the financial statements, the testimony of Mr. Kobak, your own evaluation.

A And what I have heard?

Q Yes.

A This publication has a negative value. It is going to create enormous problems for the buyer because he must overcome the serious possibility of postal fraud, he must overcome the fact that it is not one publication, there were two publications, and this is a very small market, and this publication has cut that market in half with two different names so he is really only get -- if he buys half of Taxi Weekly he buys half a name. He may very well have to reinvest in the publication to re-structure it. He runs the possibility that advertisers, if it turns out that the circulation if false or is not accurate, that advertisers who bought advertising in it can claim some kind of a rebate because they did not get what was represented to them so this publication could be a liability.

Q Thank you very much. And just one other subject.

Pursuant to a request from me, did you examine the publication which was also circulated in those years in the industry known as the UTOG Newscaster?

A Yes.

Q Did you have occasion to review the affidavit of ownership and circulation filed on behalf of that newspaper and published in its October publication?

A Yes.

THE COURT: October what?

MR. McGRATH: 1964, Judge.

THE COURT: All right.

Q And do you recall the circulation as certified by the statement of the UTOG Newscaster?

A I believe it was 2500.

MR. McGRATH: Thank you. No further questions, Judge.

MR. NESSEN: May I, your Honor?

THE COURT: Yes.

MR. NESSEN: I would like to offer in evidence, your Honor, Taxicab Industry for 1962.

xxx (Defendants' Exhibit BI marked for identification.)

THE COURT: Any objection?

MR. WENTZEL: No.

THE COURT: Received.

xxx (Defendants' Exhibit BI for identification received in evidence.)

CROSS-EXAMINATION

BY MR. NESSEN:

Q Mr. Harnett, my friend Mr. Wentzel asked you just a while back about publications under 150,000 in circulation that may have been audited by ABC?

A Yes.

Q And you had done, you had checked, you said, with ABC. How did you do that, sir?

A I called ABC directly and talked to Mr. Howard Kuts, who was assistant managing director of the audit bureau of circulations. He told me that the Taxicab Industry Auto

Rentals News was a member of ABC during 1961 and 1962 and then dropped out. Its circulation was approximately 8,000 in 1961.

Q Did he tell you anything about Taxi Industry? I mean Taxi Weekly.

A He told me that he did not believe it had been a member of ABC.

Q He said that it had not been to his knowledge?

A Yes.

Q And Taxi Age, did he mention that?

A No, I did not know anything about it.

Q I show you Exhibit BI, and what do you find on the front page there?

A There is a seal called audit paid circulation which is the standard seal of the audit bureau circulation. There is a statement under it.

Q Now, could you tell the jury why it is that you did not make such an intensive study of Taxi Industry rather than Taxi Weekly?

A Because it is a relatively small piece of this total package and it didn't strike me as being the major point here. The revenue, circulation revenues ran about $2500 and dropped off sharply to about $900 and then the advertising revenue ran in the 40,000 range, so that it didn't seem -- it wasn't the most important part of the company.

THE COURT: Wait a minute.

The circulation revenues were what?

THE WITNESS: Taxi Industry was $2500 in 1961, $2300 in 1962, $1200 in 1963, and then $1400 in 1964.

THE COURT: Now, what did you say about advertising revenues?

THE WITNESS: The advertising revenues for the same period were $45,000 in '61, 45,000 in '62, approximately one-half of Taxi Weekly, 43,000 in '63, and 42,000 in '64.

THE COURT: I am confused about this, and I know I read a figure to the jury in the beginning about advertising revenues of Taxi Weekly. That stipulation has been withdrawn but do we have any figures?

MR. WENTZEL: Yes, your Honor, I put those back in evidence. For instance, 1964 the figure I can recall is $64,070.

THE COURT: 64,000? What is that in, in a financial statement or what?

MR. WENTZEL: Yes, sir.

THE COURT: May I see that?

(Pause.)

MR. NESSEN: May I go ahead, your Honor.

THE COURT: Yes. Let me see, I've got advertising revenues for Taxi Industry, 1961, 45,000; 1962, 45,000; '63 what? What is that?

THE WITNESS: Advertising revenues for Taxi Industry in '63, 53,000 -- Taxi Industry, I'm sorry, 43,515.

THE COURT: And '64 is 43,000; is that right?

THE WITNESS: Well, we may be looking at different --

THE COURT: 42,000?

THE WITNESS: That's correct.

THE COURT: Okay, Mr. Nessen.

BY MR. NESSEN:

Q In the financials that you have there, was there any breakdown between Taxi Industry and Taxi Age?

A No.

Q Now, let us assume that on the hypotheticals that I gave you that no fraud actually has yet been proved but you heard all the evidence about Taxi Weekly's circulation and you discovered that Taxi Age comes along and runs virtually the same newspaper except for, indeed it is the same newspaper except for the title. Do you regard this newspaper as a salable, or these newspapers as a salable commodity?

A Not under those circumstances.

Q And why is that?

A Because having a general familiarity with second-class mailing, I would say that this is risky, this is a receiver risk.

THE COURT: Anything else?

Q You said that you didn't know how to evaluate a partnership. Do you know how to evaluate corporations?

A No.

Q What did you mean? Would you tell the jury?

A I am a publisher. I think I know how to evaluate a publishing company and a publishing operation.

Q And a subchapter S publishing corporation?

A I have had some familiarity with them but I am essentially a publishing operator and acquirer and seller of publishing properties and that's my area, what I regard my area of knowledge.

Q And the form of the publishing house, does that make any difference to you? Can you still --

A Yes, that has a bearing.

Q And what is that bearing?

A Well, if there are tax angles or accounting angles that require special expertise that was one thing, but what primarily concerns me is the value of a publication and my estimate of its profitability.

Q And whether it is in a partnership other than the tax implications, or a corporation, is irrelevant to you; is that correct?

A It is not my area of expertise.

Q Is it relevant to analyzing a publishing company?

A It might be. Situations vary.

Q Would it be in Taxi Weekly?

A I don't think so because Taxi Weekly has a very specific set of problems from a strictly publishing viewpoint and to evaluate it on strictly publishing yardsticks indicates that it is a publication in serious trouble.

MR. NESSEN: I have no further questions.

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Anything further, Mr. Nessen?

MR. NESSEN: No, I have nothing, your Honor.

THE COURT: The defendants rest?

MR. NESSEN: My defendants rest.

THE COURT: Mr. McGrath?

MR. McGRATH: Very briefly, your Honor. It is all documentary evidence.

I offer and ask to be marked the 19 -- May 5, 1964 LOMTO Bulletin.

xxx (Defendants' Exhibit BJ marked for identification.)

THE COURT: Are you offering that?

MR. McGRATH: Yes, your Honor.

THE COURT: Any objection?

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MR. WENTZEL: May I see it, please?

THE COURT: Yes.

MR. McGRATH: The November 1964 ITOC News.

(Defendants' Exhibit BK marked for identification.)

MR. McGRATH: All existing 1966 editions of the UTOG Newscaster. There are eleven, Judge.

(Defendants' Exhibit BL marked for identification.)

MR. McGRATH: The 1965 bound volume of Taxi Weekly.

(Defendants' Exhibit BM marked for identification.)

THE COURT: Now, I don't know -- you are offering all of these, right?

MR. McGRATH: Yes, your Honor.

MR. WENTZEL: Your Honor, I have an objection to the defendants putting newspapers into evidence. At least if it is for the purpose of establishing the truth of the materials contained in articles in the newspapers, I don't think that's a proper way to introduce evidence. I mean, it's one thing for us to put in formal minutes of meetings which we have done here without objection, but I don't know about newspapers.

THE COURT: The newspaper was put out and it said this. Now if that is relevant --

MR. McGRATH: We are showing two things. One that in the year 1964, and particularly around the month of this alleged conspiracy, LOMTO, who was one of the subsequent members of ITOC, already had had its own publication.

THE COURT: You are putting them in for the fact of the newspaper.

MR. McGRATH: And also there is in this particular edition something which is stated and it is concerning Morris Marken.

THE COURT: In other words, do you intend to have the jury look at that and say, oh, because this newspaper says this, I find it to be a fact?

MR. McGRATH: No, not necessarily.

THE COURT: You are just introducing it to the purpose of showing that that newspaper said that at that particular time?

MR. McGRATH: And that was the LOMTO official publication at that time.

MR. WENTZEL: In other words, that's the statement of LOMTO?

MR. McGRATH: No, no.

MR. WENTZEL: I can't cross-examine this piece of paper, your Honor.

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MR. McGRATH: Is there any question as to its authenticity?

MR. WENTZEL: No. I will concede that.

THE COURT: I will receive it on the grounds that I mentioned. There is no question that the newspaper is authentic and says what it says. That's all it is being introduced for.

MR. McGRATH: That's all. And I have the same offer for UTOG.

THE COURT: Mr. Wentzel, do you object to all of these?

MR. WENTZEL: Yes, insofar as they are offered for the truth of the contents, yes.

THE COURT: Okay.

MR. WENTZEL: And I hope that's the case.

THE COURT: Okay.

MR. McGRATH: Well --

THE COURT: So BJ, BK, BL and BM are received.

(Defendants' Exhibits BJ through BM for identification received in evidence.)

THE COURT: Now, do you have anything else?

MR. McGRATH: Previously, Judge, I believe that we had offered, I am not sure whether they were accepted, 64 editions of the UTOG Newscaster, and --

MR. NESSEN: They are not in evidence.

THE COURT: Have they been marked for identif

MR. McGRATH: Yes.

THE COURT: Where are they?

MR. McGRATH: We are looking for them.

MR. WENTZEL: What is the purpose of offerin

MR. McGRATH: These were at the time that yo
reading from --

THE COURT: You know, this jury is not to go
sit down as if they were at the New York Public Librar
start a program of reading all those bound volumes.

MR. McGRATH: I am going to argue from them

THE COURT: There has got to be some specifi
that you are making and you are going to sum up in ab
minutes.

MR. McGRATH: That's all we have them for i
summation.

THE COURT: Well, where is it?

MR. McGRATH: I believe that it was on coun xxx
table for some time.

THE COURT: If you can't find it, we will p

MR. McGRATH: I will pass it at this time.

THE COURT: We will pass it forever. Now,
got to rest. I can't hold this up.

MR. McGRATH: Fine, Judge. We are finished.

THE COURT: All right, the last exhibit is BM. Mr. McGrath, you go ahead and sum up.

MR. NESSEN: Your Honor, may I go first, if I may?

THE COURT: All right. The defendants may go in any order they want.

The usual motions by all defendants are made and decision is reserved so let's go ahead with the summation.

MR. NESSEN: May it please the Court, madam forelady and ladies and gentlemen of the jury, Mr. Wentzel, Mr. Pratt, Mr. McKnight and Mr. McGrath: As you might imagine, during the trial of this case, all during last week, I began to think of what I would tell you here at the end of the case. We put in evidence, lawyers do, and you cross-examine, and you put this documents, all with the aim of coming here and wrapping the case up for you and telling you what happened.

The case appeared, up to last Friday, very little different from most of the cases that I have participated in. I was prepared during the week to tell you, and to dote on, certain significant facts. I was prepared to tell you at great length about how cross-examination work with Mr. Peterman and with due respect how he evaded, exaggerated and regretfully and unfortunately even did tell the truth.

I was prepared to tell you about Walter Grimes and how that happened, and Mr. Peterman's reaction to it. I was prepared to indeed to talk about at great length Mr. Kobak, a man of high credentials, a great expert in the field, how he came here on direct examination, if you remember, lectured to you, told you jokes about Harvard and things like that, and how he smiled, and if I may allude to a great poem, a great favorite of mine, all smiles stopped on cross-examination except some sort of grin from time to time, how step by step I showed you through that witness that all this lecturing and posturing had to be contrasted to what he said at the time.

I'll never forget, I was going through one article with him and telling him that the trends in the sixties were a certain way, and salaries were going up and that you had to survive only if your advertising rates and your advertising and your circulation was bursting. Otherwise you couldn't survive. And he said but that wasn't true in 1964. And then low and behold, I had an article written by him in 1964 that it was worse in terms of inflation that 1963. That's the kind of man he was.

And I was prepared to do that and will comment on that later, but last Friday, and I'm not sure you people realized what was happening then, but I think you realize now, it was almost like Perry Mason, a little more sophisticated and probably not such fun, but something burst out at the end, something that proved that Taxi Weekly, Incorporated was a mirage, and that was when we heard for the first time in this case, Taxi Age.

And then, you may recall, my friend Mr. McGrath had Mr. Kobak on the stand, and he was saying, running down figures that had been given to him by Mr. Peterman, although we have never seen the records on what this was based, but nonetheless he had very specific figures.

Taxi Weekly, 11,595 per week average circulation for the first half of 1964.

12,110 average per week for 1963 of Taxi Weekly.

13,501 average per week in 1962.

And Mr. McGrath looked at an affidavit, a sworn statement which I handed to you saying, "I certify this to be true," and low and behold, Taxi Weekly's circulation was not 11,595 but 6,326 in 1964 according to this affidavit. It was 5,600, not 12,000 in 1963. It was 5,417, not 13,000, over 13,500 in 1962.

Well, what did that mean? There was another newspaper. There was a newspaper that came out called Taxi Age, and I don't have to tell you, you all know ahead of the story that I am telling that on Monday we found out that supposedly for sentiment sake, for sentiment's sake, Taxi Age was sent out.

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Now listen to these figures, for sentiment sake we were told 8,000 of Taxi Weekly was printed as Taxi Age. 8,000 as compared to 5,400 printed under the name Taxi Weekly in 1962.

In 1963, 6500 for sentiment sake, we are told, were published in the name of Taxi Age in 1963 as opposed to 5600 in Taxi Weekly that's supposed to have the real name.

The figures get reversed in the first half of '64 it would appear, or in '64. There the figures seem to be that 6,326 were published, if you believe the affidavit of Taxi Weekly as opposed to 5,200 of Taxi Age.

Well, I think his Honor asked the questions, questions perhaps that I should have asked --

THE COURT: Do not refer to my questions. I am not sponsoring either side. I asked the question to clarify things, and no inferences can be drawn from the fact that I asked the questions.

MR. NESSEN: I didn't intend that, your Honor.

THE COURT: You comment on the evidence.

MR. NESSEN: Absolutely, the fact that any one of us may have asked the question, what counts are the responses.

The question was asked and answered, trying to find out the truth, the real facts, there must have been a purpose, there must be a purpose for all of this, and the purpose, what is it? What do you do? Why do you do something? Well, let me take you to Monday, and we hear from Mr. Peterman that he was well aware and, indeed, discussed with someone, well aware that in order to keep a second-class permit, the ratio between your free and your non-free, your paid circulation, has to be a certain amount. Couldn't say what it was. And that was the beginning, ladies and gentlemen of the jury, of the truth.

The fact of the matter is, and there can be no question of this, that the reason for Taxi Age, the reason for Taxi Age is to keep that vital second-class permit because that makes it cheaper to mail, and whether we like it or not, it just goes out better too. Vital to the business.

And we elicited, and you heard that the books and records that were kept by Taxi Age, Taxi Weekly, and shown to us in pre-trial, none of them revealed Taxi Age.

Now, I say, ladies and gentlemen of the jury, that this was like Perry Mason, a lucky Perry Mason, I suppose. I don't understand why Taxi Age wasn't up front. Why you did not hear from them from the beginning what it was, what it was doing, except that we know it was a fraud on the postal authorities. That's as clear as a bell in this case.

Mr. Kobak, if you recall, was on the stand, and he walked away, and you know that he really had no idea, no idea whatsoever, of the kind of figures we were talking about. And if you believe Mr. Peterman, all he did once was mention something like this. He wasn't certain that he had mentioned even the name to Mr. Kobak.

Well, the figures and the cross-examination of Mr. McGrath revealed that in 1965, in 1965 Mr. Peterman admitted that he had lied in the affidavit. And I think you will hear from Mr. McGrath why it was that in 1964 Mr. Peterman had to admit he lied because the figures, the circulation income figures were such that he couldn't possibly get away, possibly get away with lying and saying that he didn't lie in the 1965 affidavit, a sworn statement to the Post Office, vital for the second-class permit.

Well, ladies and gentlemen of the jury, the figures are such that I know, and there is no question that he lied in the 1964 affidavit.

In 1964, for example, in October of that year, the figures Mr. Peterman showed for circulation of Taxi Weekly -- Taxi Age, actually, and we do not know which is which, is 1,156 for the whole month. And that's the figure.

The figure for total paid subscribers in October of 1964 in the affidavit of Taxi Weekly is 5,675. Now if it went at 10 cents a copy, that's around $567 per week. Let's make it 500 even. Four weeks. That would be $2,000. But the circulation income as shown by something that Mr. Peterman got up, was only $1,347.

You ask yourself, you ask yourself why? And the notion that the 1964 affidavit was true is false. The notion that the 1963, the 1962, the 1961 are true is false. Taxi Age -- and you have heard a little bit about, what was it 20 percent or 25 percent rule on cross-examination, Taxi Age was the same as Taxi Weekly, and the fact of the matter is that Mr. Peterman tries to tell us that he went down to the Post Office and saw some unnamed person, and they said they could do this.

Well, it is very strange because it is very inconsistent. Mr. Peterman claims that that had been going on before, and in his testimony, in his cross-examination, in very careful notes that were kept here, why, it looks very much as if Mr. Wysinger had heard about this.

Well, if Mr. Wysinger had heard about it over the years, why was Mr. Peterman going down to the Post Office and checking on it? It is a bunch of nonsense.

Now, what is the result of this? The result is that at the end of the week, and yesterday and today, you heard our expert witness, not a fancy man who evaluates on corporations, on multiples or claims to at least in this courtroom, not a man who is way above the firing line, but a man in there

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evaluating the publications: Are they viable? What would you pay for those publications? He told you, apart from anything else -- and I will come back to this -- that no reputable publisher would get involved in this kind of thing. This is unsellable. That's why what Taxi Weekly did with Taxi Industry, that vital ABC rating that Taxi Industry only had for one year, or rather, two years and dropped out, that wasn't for Taxi Industry for more than two years, and it was never for Taxi Weekly because Taxi Weekly was a mirage. It was two things, two things, and so what happens is that when we come down to this whole case, and when you hear about what my clients did supposedly, when I talk about liability, and I must talk about that, what it all comes down to is in the final analysis this business was not worth zero; it was worth less than that. It was a potential danger, a tarnisher of reputation.

It is unfortunate. I don't understand why we didn't have that right up front on plaintiff's case. Why this went on for a week. And I dare say you are going to hear from Mr. Wentzel how my clients violated the law, the anti-trust laws. My Lord, what did Taxi Weekly do? And what did it do for the course of its history?

Well, I could end this story right here because you can end this case right here. That's it. But you are entitled, and my clients are entitled, and I suppose I have a little pride. I would like to analyze with you what I would have done and what I would have said to you but for Taxi Age, and what happened in this courtroom. So let me do that, if I may, and that may take sometime but it is important that you understand.

There are essentially three limits, as the Court will tell you, to plaintiff proving a case.

The first is trying to prove liability. The other is showing that that liability caused what we lawyers call the injury, and the Court is going to explain that to you much better than I can and will at this time.

The question of what Taxi Weekly, Incorporated was worth, the issue of Taxi Age, deals primarily with that damage issue. It reduces the case to a filament, to zero, unfortunately.

Liability. What did the plaintiff prove on liability? Well, as you remember, Mr. Peterman was the first witness in this case, and he was the primary mover, and I suppose I don't have to race through in very much detail. I think you know pretty much what the facts are.

Mr. Peterman came as an advertising man and worked for about a year and then he said, and probably it is true, he began working as the business manager taking care of things day-to-day operations for Mr. Wysinger.

Now, we have heard a little bit about it, and we are going to hear it unless Mr. Wentzel decided better of it, but I suppose we are going to hear that the salary of Mr. Peterman was $5,908 in 1957, and then $5,772 in 1958. You are going to hear this in the context, in that mirage, that second mirage that add back mirage that Mr. Kobak talked about, about what reasonable salary is.

Don't be fooled. The pattern from the documents, and there is no question of it, the pattern of the documents of the books that we got to see was that each year in January, each year in January Mr. Peterman and Mr. Wysinger took bonuses, took additional compensation is what they call it. Why January? Well, I think you all understand that we pay taxes from December to December, and if you postpone extension it goes over to the next year, and you are not charged with the taxes until April or in those days it may have been March, I don't remember, but you don't get -- you postpone it for about 15 months, and that's why companies, some companies, and there's nothing wrong with that, pay addition compensation after the year ends.

But the fact of the matter is don't let Mr. Wentzel, or if he mentions it, let's not fool ourselves about 1958. What do the records show was the additional compensation?

I say that at the outset as sort of a footnote but I suspect it, and I do suspect my opponent will mention that. Anyway, it doesn't work.

Now, I would like to analyze what Mr. Peterman bought in 1958 with you. Now, you recall his testimony, and I am quoting from our good notes, it is that "He and I agree," that is Mr. Peterman talking about his getting a half share in a business from Mr. Wysinger, "He and I agreed we would do it. I told him I didn't have much purchase money. I told him I might have to borrow it from a bank. We arrived at a figure which was mutually satisfactory."

And what was that figure? The figure in 1958 was $15,000.

Actually, as the state financial statements show, Mr. Peterman actually bought into the business that had a surplus; that had surplus already in it, and you look at that surplus and you see that it was -- some figure I have here somewhere -- a surplus of $14,888.

Now, economically, then, half of that incidentally belonged to Mr. Peterman, so that his selling price realistically from an economic point, his buying price, rather, was below 15,000. But so be it.

What really counts is, what did this man buy into? What was the business of Taxi Weekly in 1958, 1959 right

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through 1964?

Well, ladies and gentlemen of the jury, you have heard talk about two-thirds of the circulation going to fleet owners.

I couldn't really understand -- more than two-thirds I could never really understand it until we got into this Taxi Age bit and I started analyzing things.

The fact of the matter is that it -- take '64, that 7,000 supposedly went to the fleets, and 4,000 went to others. Of the 4,000, 3,000 were not paid, went free.

Thus, there was 8,000 paid circulation of which seven-eighths depended on the fleets, on some of my clients, and that's the truth.

So that here was a business, here was a business that depended -- and you heard Mr. Wysinger's testimony read to you -- this was a business that depended on the goodwill of the fleet owners. And that's the way the business was run.

Now what does goodwill mean in a trade publication? What do you do? Well, you can't run it as if it were the New York Times. That just isn't its function.

For example, Mr. Wysinger and Mr. Peterman were sent by Taxi Weekly, Incorporated and were invited to attend some meetings of the Metropolitan Board of Trade, the Metropolitan Taxi Board of Trade, and the question was, was any other newspaperman invited? No. And what happened at that meeting? People got up, and I say Mr. Peterman used the word "our leaders" it doesn't make any sense to say your leaders -- you may recall that little hassle we had earlier on in this trial -- and people would get up and solicit the membership for bulk circulation for Taxi Weekly, or Taxi Age, whatever it was.

Now, Mr. Peterman in his deposition admitted that he wasn't there for news. That's a flat statement that I read in this record. He wasn't there for news. He was there, ladies and gentlemen of the jury, because you know why he was there. Now, I don't think there is anything wrong. There surely isn't anything wrong in the United States for each group to have its own newspaper, its own organ, propaganda, if you will. That's what free speech is all about. I dare say Tom Paine put out propaganda, and in the melting pot, in the body politic from free speech comes a consensus, or comes a way of governing. That's what we believe in the United States. Free speech, and you are free to hire or to read or to support the newspaper you want.

And Mr. Peterman is free to be the handmaiden, Mr. Wysinger is free to be the handmaiden of whomever they want.

They are also free to be independent, but you take the consequences of independence.

And let me tell you, Mr. McIntire, whose widow is a defendant here in this case, he got two subscriptions, put in for two of them. And they were carried on the books for some of these years under the name of George V. McIntire. One was a subscription, a bulk subscription of 126 newspapers that went to the hack bureau where in those days new cab drivers came in. It was circulated there.

The other was a 40 issue subscription for Metropolitan itself, and you recall I finally got Mr. Peterman to refresh his recollection that it was 40.

And now I ask you, ladies and gentlemen of the jury, a public relations man, fleet owners taking bulk subscriptions, what were they getting for their money, for the seven-eighths, at least seven-eighths? I am not sure that it isn't more based on some of the statistics I have heard about cancellation, but the support of the circulation, the paid circulation, the life blood of this newspaper, or these two newspapers, the life blood was the fleet owners.

So be it.

And I say that it went on, there was bickering behind the scenes, I think you heard a little from Mr. Wysinger. It didn't really come to it for until the end of 1963, and then 1964.

And what was the bickering about? Mr. Wysinger told you what it was about. First it was about apparently

Mr. Peterman's unwillingness to make promotional expenses although the circulation was stagnant.

And then another important item, a very important item, Mr. Peterman apparently disagreed with the general policy of Mr. Wysinger who knew something, who knew something, he said, over forty years in the industry, and who had, incidentally, a lot of goodwill in the industry. Maybe, Mr. McGrath, you can carry on in that direction for me, so that I can shorten this.

Well, in any event, there were two issues of key importance in the taxi industry in the spring of 1964. I suppose I have to say it although you could tell me very quickly what they are. There was this increase, or proposed increase in the fare, a 10-cent hike was proposed by the fleet owners, the taxi owner operators, most of them wanted more. The taxi fllet owners wanted more because all of it would go in their pockets.

The taxi fleet operators wanted to give 5 cents of that ten-cent hike right to the driver, and the other 5 cents in fringe benefits.

Now, really we get from the depositions that were read here -- it is pretty clear that really the problem with Taxi Weekly, and with what they were or were not doing for the industry, was largely over this fringe benefit that Taxi

Weekly wasn't getting across the point of view the way the fleet owners thought it should be. Now that's pretty clear.

The other issue of course was the union, Jimmy Hoffa's union was at this point attempting to organize, and in fact, UTOG, as you recall, had really negotiated a contract or a proposed contract at this time, and that was dividing the industry.

Now, Mr. Wysinger or Mr. Zeff got in that article on "Bye, Bye Jimmy," I read that to you, I guess, or told you about it when Jimmy Hoffa went to jail.

One thing is for sure: Mr. Peterman acknowledged it, was furious when Mr. Wysinger, through Mr. Zeff, put in that article on June 15th that supported the position of the fleet owners. And Mr. Wentzel will tell you, "Well, it was because of how it was said." Well, you may believe that or not. I do not.

In any event, there can be no denying one thing, because it was as clear as a bell. Mr. McIntire, in the spring of 1964, the man who was a public relations man for the Metropolitan, the man who Mr. Wysinger said in his deposition he took press releases from all the time, Mr. Zeff said so. He came to Mr. Peterman, and I now quote from a part of the deposition that was read into evidence to you, and at page 59. This is Mr. Peterman testifying about

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Mr. McIntire coming to him with a memorandum or whatever it was, a press release, I think.

"A Well, as I said, it had to do either with a need for a fare increase, which the organization he represented was pushing for, and/or at the time the unionization drive which Metropolitan at that time was resisting.

"Q Did you tell him you would not publish anything about the fare increase?

"A I told him at that time I would not publish anything that was supplied by him.

"Q By him?

"A That's right.

"Q That referred to his conversation regarding the union?

"A That was a general statement."

Now you may ask me, you may ask Mr. Wentzel in your own mind, what is the consequence of doing that, in making such a flat statement? How can you do that? How can you do it to the people who are supporting you? Why were you doing it? Well, the why, Lord knows.

Mr. Peterman, for whatever reason, probably because of his fight with Mr. Wysinger, a display for independence, was fighting for independence. Well, if you fight for independence, take it, but take the consequences.

THE COURT: Mr. Nessen, whenever you are at a train of thought we can take a short break?

MR. NESSEN: Right now will be fine, your Honor.

THE COURT: Let me just say to our guests, this is an anti-trust case under the Federal Statute, a section of the Sherman Act, and you have heard reference to Taxi Weekly, that's the plaintiff. Mr. Nessen, who is addressing the jury now at the end of the seven-day trial is one of the defense counsel, and there are a great many issues, and I would not presume to describe them all right now.

MR. NESSEN: That's what I am trying to do.

(Recess.)

MR. NESSEN: May it please the Court, now, ladies and gentlemen, you know what the circulation is, you know what the editorial policy is, you know what's brewing underneath, and now Mr. Wentzel may claim gee, there is no evidence, there is no evidence of what was brewing underneath in the paper.

Well, that's because, he will say, there was no dispute. Well, if there is anything so clear in this world, if there is any fact established in this trial, anything that we can grab a hold of, there was bickering between Mr. Wysinger and Mr. Peterman. There can be no question of that. And there can be no question it was in part about policy.

And sure, Mr. Zeff put in the articles, and as I read to you from the depositions, Mr. Peterman complained.

Now, what does that lead to? Where does it go?

When Mr. Peterman bought out Mr. Wysinger, there was no longer anything holding this bubbling caldron from spilling over. The very first issue, what was going on behind the scenes, the dispute erupts in a statement of policy.

September 21, 1964 where we hear about urgent problems facing this industry, and where the solution of these problems needs a new approach, so be it. And I intend to see that in newspaper is really of its newspapers, all of them. The implication is clear as a bell. No longer will Taxi Weekly be the handmaiden of the fleet owners. Good for independence.

And then later we hear people being accused in the front page of influence peddling, right on the top, and an independence declared.

Well, I'm independent too, but I don't expect the people I call influence peddlers to hire me. There's a price for independence.

Now let's talk about the cancellations for a minute in July of 1964 when seven people cancelled and some of the named defendants, my defendants, cancelled.

Now the cancallation is a strange word for in no way was there any legal obligation under contract. The understanding was indeed it was part of the whole understanding. It was a fact that the fleet owners had a right to cancel at will.

And I say, and I think it will be the law, and it is the law in this case, that they had every right to cancel a newspaper that they didn't want to support, whose views they didn't believe in. That was their right. And it was their right to speak to each other and tell each other, and that was their right. That's not an anti-trust case. That doesn't make the stuff for anti-trust cases because, think of it a minute, there is no meaning to freedom of speech if you couldn't do that.

I mean, the very notion that I would have to support or that a group of us would have to support a newspaper or a newspaperman espousing views we don't like. It's an anathema in the United States.

Well, I had intended but I think I am going to just cut through it and summarize but take it that it is based on the depositions you heard, I am going to summarize. You heard from Mr. Murstein, from Mr. Naren, from Mr. Milton Marks, from Morris Lefkowitz, from Mr. Heit, and you, Mr. Suchman. Also from Mr. Schaffran and Mr. Plotsky. Their depositions were read here and they told you that they didn't agree with the policy, each one of them. Some were more specific than others focusing particularly on the welfare and fringe benefits, and one fellow, as you remember, one of my clients complaining that I had to go out to the drivers and explain it instead of the newspaper that I was giving away to them doing it for me.

And Mr. Plotsky admitted speaking to the others, and he had a right to speak to the others.

Now, it may very well be that Mr. Plotsky said, "Well, let's cancel." So be it. It wasn't any accident, and I don't claim it is an accident that these men cancelled on that day because they were furious. You'll see, and you saw that at the end of July Metropolitan had to put in a full page ad at its cost. Mr. McIntire paid for it, to get its view in the way it wanted presented in its handmaiden or its former handmaiden.

Well, that's the way it goes. Now you are going to hear about my other client, Mr. Benjamin Botwinick. I don't understand why he is in this case at all except for a manufactured conversation, or at least the guts of it is manufactured. Mr. Botwinick, even if you assume that the conversation went as Mr. Peterman would have it as his notes, funny how he always has notes for things that he wants to prove. Sometimes they are a little inconsistent because he hasn't thought it out, but -- I was saying, Your Honor, that Mr. Botwinick had a conversation and Mr. Peterman had -- tells us about it. Now, even in the best of circumstances, there was no threat by Mr. Botwinick. He asked them, sure, if you believe Mr. Peterman, we want you crusading as in the old days.

Well, apparently there is a negative implication in Mr. Peterman that he wasn't going to crusade, but there was no threat.

And what a strange thing. This was supposedly on April 17th, this conversation, and Mr. Botwinick was supposedly one of the leaders and controllers of Metropolitan. When does Metropolitan cancel its subscription? Not until October, after Mr. Peterman has told one and all that he is making a declaration of independence, after the gauntlet was thrown down that I am going to satisfy all of the possible readers.

Now, it is very strange indeed to think, if Mr. Botwinick, in April, was conspiring against Mr. Peterman, if there was that big conspiracy that Metropolitan itself waits until after Mr. Peterman has told him, waits a month, almost, after Mr. Peterman has told him of the change in policy without question, so you have heard, and you will hear evidence that Mr. Botwinick was this or that at Metropolitan. Really, what did he do? You can't just automatically say that one man is a member of Metropolitan, and I think his Honor will charge this way, therefore everybody in Metropolitan is, adopts the policies and is responsible for the acts of the others. That's not the law. So I don't understand why Mr. Botwinick is here.

Now, there is another claim, and I think I would like to get into this, and that is this question of pressure on advertisers.

I tell you, that's a mirage. I think you got a little of the flavor of how Mr. Peterman went about taping various people when you heard the tape with Baron, and how Mr. Peterman would lead people on supposedly thinking that he is there to make peace, and friendship and how some of the people tried to help him. One of the men suggested that he go see Mr. Murstein because he is a charitable man. You will see how Mr. Murstein's charitableness, how it is turned around by Mr. Wentzel. You will hear about that. It doesn't pay to be charitable, not to Mr. Peterman, unfortunately.

Anyway, there is all this pressure on advertising, and you would think that you were going to hear loads of advertisers come in.

Now, what did you hear? Well, let me first look at Exhibit 1 if I could find that.

We have here a chart on advertising in Taxi Weekly or what we thought originally was Taxi Weekly but it was Taxi Weekly come Taxi Age. And we see advertising that goes -- it doesn't really start to fall off until after September and October, indeed, not really until January of '65 can you get a fair reading, because what you see here in September, for example, and the early part of October, that was the time when the Taxi Weekly, Taxi Age, or whatever it is called, used to publish its anniversary issue, and Mr. Wysinger used to get all these wonderful ads, all these great ads from garages and from people, and Mr. Peterman says he solicited all these, and then there was the Christmas issue.

You heard Mr. Peterman acknowledge, as he had to, Mr. Wysinger got those wonderful Christmas ads too. So the real gage here is, for example, that in October of '64, in 1964 the advertisers were about 4,000 in 1963 they had been 8,000.

Now, then you go to the next month to really get the real picture in November Taxi Weekly had 5,000, over 5,000 in ads, and the year before it had 5,900 in the same month, so there really wasn't any falling off in advertisers in Taxi Weekly until you get to January which is the fairer gage, January of '65.

But the same chart here shows some interesting things. As the advertisers, which fall off with circulation, we know that, Mr. Kobak told us that, as the advertisers started falling off, there is a dramatic picture in circulation. For example, in January of 1965 the circulation income for the whole month was $229.

The year before it had been $3,442,

Is there any wonder that advertising fell off from 3500 down to 3,000? There is no wonder the advertising is catching up with this dramatic loss in paid circulation and in circulation. That was bound to be.

Now, his Honor will tell you, in his charge, what the law of approximate cause is. The damages, if there were any illegal conspiracy, and I say that's nonsense, if there were an illegal conspiracy, there has to be a substantial connection. You have to say that that essentially caused the damages. And, as I read Mr. Kobak, as I read everyone, Mr. Harnett, as I read from all the articles of the learned Mr. Kobak, the hired gun, as I put it to my colleagues, as you read them, there is no question, as circulation drops, you have got nothing to sell.

Okay. What is this pressure? You get Future Motors. We heard a lot about Future Motors. Well, when it cancelled in February, or cut down in February of 1965, and it wasn't until then, in February of 1965, when it cut down from its usual rate to a lower picture, and then entirely in March, the circulation of Taxi Weekly was down to something like 100 -- exactly $131.

Now who is going to advertise in such a newspaper? I mean, I say Taxi Weekly. I mean Taxi Weekly-Taxi Age. Who is going to do that? I mean, the circulation income and obviously it had some reflection on actual circulation, is less than 4 percent of what it had been the year before in the same month. Can you wonder why Future Motors wouldn't put its money in Taxi Weekly.

And now I could show the same dramatic picture and I think I won't, but the same dramatic picture with Chrysler, and with Ebetts, and all the advertisers that Mr. Peterman says cancelled because of pressure. They cancelled because it wasn't their vehicle, or, if you believe Mr. Zeiler, and we have no reason to disbelieve him, Chrysler, for example, wasn't advertising anywhere. That's what he told you on this witness stand.

And now who came to the stand? We are talking about liability, the question of the theory, one of the theories of my opponents' case. Who came to the stand? There was Mr. Zeiler, you may have remembered him. He told us that he heard that Mr. Murstein was apparently unhappy.

And why was he unhappy with Mr. Peterman? Because he had heard rumors that Mr. Peterman was being supported by Morris Marken. Now I suppose if there is one thing I don't have to do is tell you who Morris Marken is. I don't think you are ever going to stop and go into a checker cab ever again in your life without thinking about this case and probably the name Morris Marken.

In any event, Mr. Zeiler reports Mr. Murstein was unhappy about that because no one wanted anyone to have a monopoly in the cab business in New York. That's basically it. That's what Mr. Zeiler said Mr. Murstein told him, what he was talking about. And there was a question about whether one cab company, if you recall, the one cab company that makes the big cabs, was going to get a monopoly in New York. That's the anti-trust problem in this case. That's the substance of it.

Now, Mr. Wentzel asked, and again I have my colleague's notes to rely on, "Do you recall passing this information on?" Mr. Zeiler said categorically, "No." Mr. Zeiler wasn't even in charge of adversiting. Had nothing to do with it.

I asked, and I am quoting, and of course it is your recollection of the evidence that counts, but in any event, I am quoting, "Did anyone suggest to you that Chrysler not advertise in Taxi Weekly?" Mr. Zeiler's answer was, "No."

I asked, "You had nothing to do with advertising?"

Mr. Zeiler said, "That's what I can't figure out. I had nothing to do with advertising."

I asked him then, "Were Dodge and Plymouth advertising with anyone in late 1965 or earlier in the year?" And he said, "No."

Mr. Wentzel read from Mr. Zeiler's deposition, and that's an interesting thing. You all know about this reading, and you heard references to taped conversations. Apparently Mr. Peterman taped a lot of people. And he said, and I am quoting directly, "There has never been anybody putting pressure on me." I am sure that you are going to hear from Mr. Wentzel at great length about Mr. Zeiler's testimony in depositions that were read and that he adopted here on the witness stand, and because his memory was just -- well, who could remember events that happened back in 1964? Or '63?

The only thing I remember in 1963 actually was where I was when the President Kennedy was shot, and I was, Mr. Wentzel, in your office on another case, not on this case. We were having a deposition and I remember the witness was so upset we stopped.

THE COURT: Okay, let's go on.

MR. NESSEN: But in any event, no one really remembers, and I can understand that, and you understand that.

Now, the whole reading is vital. On page 26 we read

"There was no customer who demanded that we remove any advertising." This is Mr. Zeiler. "At various functions in talking to people they would bring up conversations."

"Q And what would they say?

"A About the paper, about Les Peterman and so forth? But at no time did anybody demand --

"Q You used the words, and so forth, and I am at a disadvantage. I should like to know what and so forth means."

What I am doing is reading a deposition that was taken years ago, 1969. It was reread to you here in this courtroom. And this man Zeiler appeared here.

"Q What did they say about Les Peterman and Taxi Weekly at the time?

"A Everybody had different complaints in regard to our advertising; and the paper.

"Q I still have to ask you what the different complaints were as well as you can recall them even in general?

"A As I recall, there were various conversations. One would be about a different size cab. The Taxi _Weekly might be or appeared to be in their mind supporting unionization. I myself have that tape where it appeared that they were unhappy with the paper."

Now, the "they" is a vague taxi fleet operators.

His vague testimony, you are going to hear a lot about it, but one sentence can be twisted out of this, and that makes an anti-trust case? It is not clear what the man meant until he was asked.

Mr. Wentzel ought to read this to you when he read the page before.

"Q Did they put pressure in any form on you to cease advertising in Taxi Weekly?

"A I received no pressure."

Anyway, Mr. Zeiler had nothing to do with advertising. Didn't pass it on to anybody that did.

And it was Mr. Zeiler who Mr. Wentzel brought out and suggested to Les Peterman to go see Mr. Murstein because supposedly Mr. Peterman was there as a friend of Mr. Zeiler, not as a taper, and why? Because he wanted to be -- because Mr. Murstein was a charitable fellow and he might help him out. Sure, Mr. Murstein may go around, might have felt sorry for Mr. Peterman if he were a person you could be sorry for, and done something for him, and tried to solicit for him, and bring him back in the fold. But you could declare your independence, you can't say, you can't come out for stands, and there is no question he came out for stands different from the union on the union issue for one, on a mayoralty campaign, it is all in the Taxi Weekly's here that are in evidence, from the fleet owners. It is all there. Once he got real control. You just can't do both. The fact of the matter is that Mr. Peterman expected that he would get the owner drivers to come back. There was questioning, as you recall, about this. It didn't make any sense. Supposedly he was gambling.

Anyway, Glen Moore, Glen Moore couldn't have come here, and he was from I guess it was Rockwell, the meter company, and he testified here, and he testified back in depositions in 1968.

We read portions of that to him just as Mr. Wentzel read protions to him too, and reading from page 19:

"Q I just want to know whether, before I had asked you a question, did customers of Rockwell, very specific questions, did they ask you to take away advertising from Taxi Weekly and give it to the Hackman?

"A No. They can't ask me anything because I am not in power to tell.

"Q Say yes or no. Just asking whether they asked you, not whether they can.

"A No. I said no, they can't tell me to take anything away.

"Q In the prior statement you understood that I am not the advertising department nor do I have any control over the advertising?"

Well, I suppose Mr. Wentzel is going to read from page 36 and pull a sentence out of that, but I tell you, read it and read it in context.

The answer, "He might have stated, asked this. He might have stated." That's the kind of testimony we have under pressure at a deposition of counsel. He says, "He might have stated, asked this," referring to what Mr. Lefkowitz may have said. "Asked me if the company was still advertising in Taxi Weekly. He might have." But as putting pressure on? No.

Ulrick is the same thing. Ulrick didn't appear here but his deposition was read, and I am sure Mr. Wentzel will read from page 32. I will read from page 13, and 14, and 21 and 24 and I will just give you the gist of this.

"Q Did Glen Moore tell you in any of these conversations," you see Moore on their theory passed the information on, Moore who said he did not feel any pressure, who denied it that Moore passed it on to Ulrick, and that reason is why Rockwell cancelled advertising in the newspaper that had virtually no circulation.

"Q Did Glen Moore tell you in any of these conversations that he had been requested or told by the taxi owners in New York or any of them or their representatives that you should have your division continue or cut down, discontinue or cut down its advertising in Taxi Weekly?

"A No.

"Q Did Moore tell you that is when he was speaking to you about the changing over from Taxi Weekly to the Hackman, did he tell you that the taxi fleet owners had been talking to him about this move, about Rockwell changing over?

"A No.

"Q He did not tell you that?

"A We weren't influenced by anything like that."

That's what you make an anti-trust case, well -- and I say I can read answers like that all through this deposition, and remember that. Remember when you hear one sentence, or one may have, might have that Mr. Wentzel reads.

Okay. I will skip over and just summarize. Morris Heit, Mr. Lefkowitz, Mr. Marks, Mr. Murstein, Mr. Plotsky, Mr. Schaffran, Mr Suchman, Mr. Naren -- all under oath, deny, almost said most of them, "I wouldn't even be bothered to do such a thing."

Mr. Suchman, whose deposition was read, who was so kind in that deposition to Les Peterman, who offered, who said, "Well, what can I do? You have got to change." He said, "You can't have it both ways."

There will be talk, and I guess I will put it on the table because it refutes itself and maybe Mr. McGrath, after lunch, can take this up and that's the question of the Wysinger

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dispute. Apparently it is plaintiff's theory, and you heard the evidence, I don't know where it comes from, that the Wysinger dispute, that poor old Mr. Wysinger was a party to this illegal conspiracy. Mr. Wysinger, who was bought out for $50,000. Well, it was a little less, and I would show you that. In effect it was only 35 but so be it. He got away. He was part of some conspiracy. I went off and retired but I hope Mr. McGrath that you have time that you will cover that and let me get on. We don't want to duplicate here. There are loads of things I want to say to you and I want to get on to the issue -- well, a covered liability.

The three people who appeared here, Mr. Peterman does have -- tells us about Future Motors and the conversation, why they quit. I don't believe a word of that. I have shown you that Future Motors quit when the circulation of this newspaper, or these newspapers, and I am going to use it plurally now, these newspapers, was down to 4 percent of what it was. I say these newspapers because I am getting on to damages. And I am a little indignant. I have to be. I have a right to be indignant about these newspapers as opposed to this newspaper.

THE COURT: I think you have covered that. You better move along for about five minutes.

MR. NESSEN: Your Honor, I am just getting into the damage situation.

THE COURT: I think you have covered that already.

MR. NESSEN: I am taking it without the --

THE COURT: All right, hour and a half is up at one o'clock.

MR. NESSEN: Well, your Honor --

THE COURT: Okay. I'm sorry. That's it.

MR. NESSEN: It is not possible for me to have five minutes after lunch, your Honor?

THE COURT: No.

MR. NESSEN: Well, I had a lot to say about damages. I had a lot to say about Kobak. I had a lot to say about that theory of ten to one, that phony theory. In other words, what I had to say to you was assuming that if you will, that the Taxi Weekly was Taxi Weekly, as did Mr. Kobak when he was on the stand, assuming that to be so, and that ten to one ratio that he grabbed out of the air by comparing what diversified companies on the stock exchange **traded at** over the counter, taking them and by some magic by discounting it to ten. Why not seven? Why not three? Why not two? He couldn't tell us. I proved to you from his own articles, by the very criteria that he thought were vital, growth, growth, in this period of inflation, that was absent here. Sure he tried to juggle you one year for 6,000, or 5,000 in advertising. But he himself had to admit it the three years. You can't tell from one year what's going to happen. But you have to worry about the circulation going down. And so this fantastic theory of adding back, adding back? Balderdash. Adding back. Take what you say on tax returns. If you are going to use this theory, this crazy theory of going business, take what you say on tax returns. That's the truth. That's where you are supposed to tell the truth. That's where you can get indicted if you don't tell the truth.

It is time, ladies and gentlemen of this jury, in America, that whether we are tape sters or non-tape/sters, that we tell and stand by what we say to the Government. And don't kid yourself, there are three specific advantages, and Kobak had to admit that, three distinct advantages, money advantages, that come from using subchapter S. And this whole business, Mr. Harnett who buys and sells businesses in this field, no fancy export man I think later, Mr. Kobak never mentioned, never said one business to you where there is such a multiple was used in a private company of the size of this. It is never used. That's what Mr. Harnett said, and that's the truth. He's in the business.

And so that even if the situation were no Taxi News, no Taxi Age, this is nonsense.

I just have one thing -- I guess it is all the time

I have. Mr. Peterman says, "I paid $50,000." What did he pay 50,000 for?

One, he said to us yesterday he didn't know whether he had seen a lawyer in the summer of 1964 about a suit. Well he had been seeing a lawyer right along because he was disputing with Mr. Wysinger. He, because in part, he hedged his bets. On the one hand he buys, and if he can change the policy and get these people who don't pay so far, and get them to pay, the owner drivers, he can have a good newspaper and run it the way he wants to. But if he loses, he has got a damage claim, an anti-trust claim, and that's what happened.

But more than that happened. He hedged it in one other way and I say it is a cheat, and he lied to us and he wouldn't come out with it until I confronted him. He went to Walter Grimes and was offering this business for $150,000. That's what the was doing, and there were no takers because he didn't tell Mr. Grimes about Taxi Age, didn't tell him about the dispute in the industry, et cetera, et cetera. There still were no takers. We know what he hoped to do. He hoped to buy Wysinger out and then turn around and make a profit because he knew he couldn't stay in business. He had bitten the hand that fed him. But there were no takers. It is a fantastic sum. And Mr. Harnett told us it was a fantastic sum.

Well, I can't -- the going business theory of

Mr. Kobak is nonsense. He told you that. His own articles told you that. I could quote him directly. On page 70 of his deposition or rather of his testimony here, that when you change the formula, when you change the formula of a new business, editorial policy, it is like a new business. Mr. Harnett agreed. You can't evaluate this business at all. It is all balderdash, and of course he wasn't told, never told about --

THE COURT: I think you ought to finish before lunch. If you want to run over a little after 1:00 I am not worried about that. Finish before lunch.

MR. NESSEN: Yes, your Honor. I would appreciate if I could go on just a little bit because the damage limit of this case is important.

THE COURT: All right, go ahead.

MR. NESSEN: Thank you. I hope I don't keep you from lunch too long. I will finish by five past 1:00.

THE COURT: All right.

MR. NESSEN: Okay. I have said enough about this ten times earnings, fantastic. But ten times earnings wasn't enough, remember that ladies and gentlemen of the jury, because ten times earnings here, if you take the three years, if you take the tax returns, comes out to $22,000. That's not enough. That's not what Mr. Kobak was paid for. So he added back and got up to 25 although he admitted you never do that when you think of the ratios of the big corporations.

Oh, well. I think I brought out that he boasted on direct examination how he testified in the Curtis Publishing case. And on cross-examination I pointed out the very same company that he was testifying 33,000,000 turned out that he had evaluated it for somebody else at 18 and it turned out that the arbitrators couldn't remember that they had gone down to 300,000. That's 10 percent Kobak.

I just say that Mr. Harnett was here. No lecturing, no posturing, directly to the point. And he told you what publishing is about, and he came to you and told it squarely. He buys and sells publishing businesses. You don't buy them like corporations. That's nonsense. That was brought out by my friend, Mr. Wentzel. You look at the publishing, what is it doing? And when it is lying to the Post Office, when it can get you in trouble, and then when it shows no growth, and all the other factors in an industry that's not moving, zero; now, there will be an issue, and maybe Mr. McGrath I would like you to cover the newspaper, what a newspaper is entitled to give and that issue I will waive to my learned colleague.

I said at the opening, in my opening statement, this was a case holding men to their responsibility, of holding what they said to the Government. And I meant tax returns.

I also mean now to the Post Office. I think Taxi Weekly, the plaintiff in this case, must be held to what it says or else we are all cheaters.

Fortunately our expert has told us that when you cheat that way you have a nothing business, a mirage. That's it. A nothing, an absolute negative. You have to pay me, Mr. Peterman, to take your business, to take your phony business, phony profits, because if you lose that second-class license, wow!

The cool assessment of the facts, that's what we want in this case. And that's what I say. Be independent, but pay for your responsibilities.

And more important, when you hear Mr. Wentzel, when you hear him tell you how terrible my clients are, based on this one sentence, pressure, or Mr. Peterman's activity, when you hear him, remember what I say: The rule is that we don't have to buy any man's newspaper whether we get together, or not. Whether we do it independently. That's the rule.

And remember this, when they accuse my client of violating the laws, what laws, and who and what is accusing people of violating laws? Who? An owner of a phony business who exists by phony information. That's the end of it.

I ask you, although you may have a right to be angry or indignant at what happened here or you may even feel pity,

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his Honor I am sure will tell you, cool assessment is what we want. In the final analysis. Mr. Peterman's personality is not at issue in this case. Only as it was or might have affected events in '64. Cool analysis. Not fancy manpower studies, et cetera, but cool analysis. That's what we ask you.

And I think your verdict is going to be no on the question, no question, no on the question of liability. Certainly no on proximate cause. And a roaring no on any question of one cent of damages. You have been in a way misled but so be it. Analyze coolly. Thank you.

THE COURT: Ladies and gentlemen, it is five after 1:00. If you could possibly make it a short lunch hour and be back at 2:00 I think we will have you out a little early this afternoon. The summations will be gotten through today but it wouldn't be fair to deliver a charge and start you deliberating at the end of the day, but if you get back at two o'clock we will try to have you out a little early.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(Jury present.)

MR. McGRATH: May it please the Court, counsel for the plaintiffs, Mr. Wentzel, Mr. Pratt, Mr. McKnight, Mr. Nessen, Mr. Turchin and Mrs. Ponsey, ladies and gentlemen of the jury:

First may I thank you on behalf of my clients, the six of them, for the attention that you have given during these past six and probably seven days.

You have heard a tale which I am sure that when you were selected to serve as jurors in this court you didn't comprehend all of the dimensions of because it is a tale of a publisher in the City of New York, and we in this city are proud of our tradition as being the printing capital of the world. In fact, not far from here there was the trial of Peter Senga in the early days --

THE COURT: Mr. McGrath, I think we should come to the point.

MR. McGRATH: I will come right to the point, Judge.

And yet in this courtroom, over the past seven days, you have heard issues discussed, you are going to have posed to you by the Court, and law charged to you which we, the owner operators of taxi cabs in the City of New York, feel is an essential First Amendment question. It is a question of our rights under the United States Constitution and its amendments, because you had in this case the story of a publisher who used his license to run a newspaper, not as the shield of our rights and the sword to protect the rights of the oppressed, but rather as a shield to protect his own interests and a sword to hurt others.

I am going to describe to you now those whom he hurt with the sword, and I am going to take first Sal Baron. Sal Baron was the executive director you heard of UTOG, one of the organizations I represent, an organization of owner drivers. And how and when did Mr. Peterman hurt Mr. Baron? It started apparently years ago, and it culminated in an issue of the Taxi Weekly in early April of 1966.

In that publication, on April 4, 1966, there were three stories on the front page, and all three dealt with UTOG and an attack upon the officers. Headline, "UTOG Bosses Bar Doors of Key Meeting." Mr. Peterman told you that one of the reasons that the UTOG organization is a defendant in this case was because it withheld news from them. In late 1964 or early 1965.

The truth is in his own paper, under the dateline April 4, 1966, he reports that he was barred from the meeting a few days before.

Second headline, "UTOG Votes to Rejoin ITOC."

If you will recall from the testimony they had been out from August 10th of 1964, a period of almost two years UTOG stood alone as the maverick in this industry.

"Dues Jacked up to 3 Bucks a Month." Hardly a complimentary headline to people who own and operate their own cabs.

And finally -- "Botwinick blast's task force."

Botwinic, you will recall, was also an officer of UTOG and had been in the room with Sal Baron when Les Peterman taped secretly the conversation.

And let me read from the page, just one other excerpt. "Early in the meeting Salvatore Baron gave his executive director's report. It seemed to some men who saw him at the meeting that Baron, as was apparently the case at previous meetings, showed the effects of having some alcohol in his system."

If you are from Princeton I guess you say a man shows the effects of having some alcohol in his system. If you are over at the Bellmore Cafeteria on Park Avenue sitting around with a number of hackmen you say a fellow was drunk, a fellow had a load on.

And you heard Sal Baron defend himself in that secretly taped report when he says, "I didn't do anything to you until you called me a drunkard in public."

And what was Peterman's response? "I didn't call you a drunkard." Equivocating. A little quirk. No he, he didn't call him a drunkard. He said "You have alcohol in your system."

Again that day, in that same conversation, Baron said to him, "You crucified me and you crucified my organization. You attacked me and you attacked my organization."

Peterman equivocated. "No, I didn't attack you. I reported that as straight reporting."

Was this straight reporting when he says, "UTOG Bosses Bar Doors of Key Meeting"? Or was it straight reporting when he took the stand and said that Sal Baron had blocked Peterman and his photographer from the meeting?

In his paper he says, "that it was Hy Bernstein the UTOG president who came out of the room." He asks Bliss what he wanted and when Bliss explained Bernstein replied that press coverage was not permitted.

The sword to hurt.

Again on the tape, Mr. Peterman says he came to make peace, and Baron says if you came to make peace, let's discuss it. But there was something that must have bothered Mr. Baron in this, the way the questions were phrased, the leading questions, the questions that kept coming back time and time again to a possible conspiracy because on page 12 Mr. Baron says to him, "Well, it could very well not be in my best interests. You probably have legal approach to this whole question. That's why you are here."

Little did Sal Baron know that when he gave this interview to Les Peterman in July of 1966, July, two years after the first cancellation had occurred, two years after it alleged that advertising was cut back, that Les Peterman was setting him up to become a defendant in an anti-trust case.

And what did Sal Baron say he did? First of all, he denied he spoke to anyone to hurt Les Peterman. He said, "I would have hurt you, you called me a drunkard." He says, "I suspected that Morris Marken was behind you. I suspected that you were somehow in the pay of Morris Marken." And time and time again you heard from this witness stand, either in writing depositions which were read to you, when the testimony of Les Peterman himself, you heard Peterman say Marken didn't advertise in my newspaper. Again the equivocation. That's true. He did not advertise in Taxi Weekly.

But I ask you to turn with me to the other publication. By that I mean Taxi Industry Auto Rental News, and it is interesting that as soon as the purchase agreement went through in September of 1964, that then you see a sudden influx in advertising. And it goes, and I have a schedule of it, through from March to August and September of 1964, one page from Checker Cabs, Marken's company. As soon as the purchase agreement goes through, there are two pages in October.

There is a news story about the 1965 Checker Cab, almost a whole spread on that page.

Two pages, checker, color, expensive. Two pages, checker, color, expensive.

That's through the end of 1964.

And you pick it up in 1965 for each and every month in this publication. There are two pages in every month but one they are in color. Two pages per month, 24 for the year. Again, the equivocation, a little diversion from the truth.

And who else was the sword used against? A man whose name you heard but once or twice in the course of this trial, Alfred J. Marks, now deceased, represented in this case by his widow. What did Alfred J. Marks do to become a defendant in this case?

On one occasion, sometime in late '64 or early '65, he refused to respond to a question by Les Peterman. Les Peterman said he wanted a story, he wanted the ITOC position on fare increase, the strike, the unionization, I believe it was the unionization that he wanted the story on. There was never a showing that ITOC had a position and that Al Marks who was the spokesman for ITOC, had that position, knew what the position was and refused to give it.

The only testimony here was that when Les Peterman demanded the statement, Alfred Marks said, "No, not now." And he becomes a defendant in an anti-trust case.

And who else was the sword trying to hurt? Through Sal Baron and through Al Marks they tried to hurt UTOG, who was out of ITOC for two years and stood alone for that publicity, which during all that publicity and from 1951 up until 1966, late in that year, had its own publication, eight pages every month, and I put it in evidence a number of those publications today, and once or twice before in the course of the trial I put them in.

UTOG, which had said on occasion that it couldn't get along with the fleets, and couldn't get along with any of the other driver organizations.

ITOC attempted to be held in this case by the plaintiffs because ITOC conducted a couple of meetings on July 13, 1964 to deal with the taxi increase, the 10 cent increase.

And ITOC, which in November of 1964, at a time when everyone else had walked away from the Taxi Weekly, had published its own newspaper.

And what type of newspaper was that? It was a simple four-page publication. It talks about the UTOG-ITOC split. It talks about membership. It talks about the rate increase. It is a simple publication for simple people, the owner operators. There are no eight pages every week. It is four pages a month.

THE COURT: I can't see that. What is the name of that?

MR. McGRATH: ITOC News. It is Defendants' Exhibit BK in evidence, your Honor.

I turn to the masthead. ITOC News, published by the Independent Taxi Owners Council as a service to the independent owner driver of the City of New York. Distributed to the members of the Independent Taxi Owners Council. ITOC officers, Alfred J. Marks, president; Oscar Katz, Benjamin Weiner, and it lists three Board of Directors.

Is this George McIntire? Is this the Metropolitan Taxi Board of Trade? Is this even the defendant Al Zeff? I submit to you ladies and gentlemen no, this is the house organ of a group of owner drivers for their own membership.

Who else does the sword attempt to hurt? Al Zeff. He was employed prior to Les Peterman at the old Taxi Weekly.

And you will hear from Mr. Wentzel that no, those years Les Peterman made $5700 and $5900 when he became a boss in '58. So if the part owner was making $5900, can you imagine what they were paying Al Zeff to write some news stories and write some editorials for that publication? A working stiff.

A person that the sword can easily hurt. A person who made one mistake, though. Sometime in September of 1964 he asked Bea Krasner for a list of the owner operators, and Bea Krasner, apparently attempted to get him that list and was fired.

Al Zeff never got the list. Al Zeff quit.

And he quit with all the emotional turmoil that was going on at that time, disputes, the fights, and he said to you, in his deposition on page 39, "I resigned effective immediately. I then, as I was clearing my desk out, felt that I may have been not precipitous, but I may not have been fair to Mr. Peterman and then I offered to stay on for an indefinite period. I don't remember whether it was a week or a few days, until he could find somebody else. Actually I called him from downstairs to offer this and he rejected my offer."

"Q Had he at any time?

"A In that second I felt I was doing him dirt. Just as a person."

Here is a fellow who just left his job, just saw another person fired, just saw the business that had apparently

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employed him for six years, saw everything going up in smoke, and he called from downstairs and said, "I will stay on." And he tells you through his deposition that he felt he was doing Les Peterman dirt. And what happened to Al Zeff? He becomes a defendant in an anti-trust action.

In my opening statement, in the opening statement of Mr. Wentzel, reference was made to the lists. Mr. Wentzel said he would prove that Al Zeff attempted to steal that list, and I said to you that I would disprove that. There is nothing in this courtroom that I heard that proved that Al Zeff tried to steal anything, and I felt that there was no burden for me to meet.

So if you wanted to hear from Al Zeff other than through the deposition, please accept my role as an attorney in saying that I felt there was no burden that we had to meet on this question and therefore I did not produce Al Zeff. Blame me, not my client.

And as to the defendant who designed publications, you heard very, very little about that in this case also, except that this was a publication which eventually becmme in 1966, late in that year, a publication which is now known and produced on a weekly basis called ITOC News.

Try as you may, Mr. Peterman cannot convince us that that defendant belongs in this case other than because it became ultimately a competitor. But when did the competition start? Two, possibly two and a quarter years after the incidents that he complains of.

Up to this point I spoke to you only about liability, the alleged fault that my clients perhaps are accused of.

I am going to take just a minute to speak to you now about damages, as Mr. Nessen asked me to. Putting aside for the moment the entire question of Taxi Age, putting aside for the moment the false affidavits, putting aside for the moment whether any of the other affidavits were true or false, let me speak to you just about one thing. What actually did Taxi Weekly at its best earn? There are documents in this case, specifically the tax returns and the financial statements of this publication, which show that in 1962 the net earnings of Taxi Weekly were $304.

In 1963, the net earnings were $170.

And finally in 1964 the net earnings were $6,100.

Is this the stuff that a business, that Mr. Kobak said is worth $25,000 times a multiple of ten, or $250,000, can you in all honesty and sincerity as business people, as people who are engaged in commerce every day of the week, accept the testimony of Mr. Kobak when he says that he would evaluate this business, this publication, the same way as he valued a publication that appears on one of the public exchanges? Or rather, ladies and gentlemen, don't you have a right to go back, as perhaps Mr. Kobak should have, and look at the financials, look at those tax returns and say this business was at best a marginal business. And compare, if you will, the testimony of Mr. Kobak with the testimony of the expert Joel Harnett who was called by Mr. Nessen. And you recall, it was just yesterday, Mr. Harnett said that at best the net worth of this business was $18,000 less a factor for liquidation of approximately $6,000 leaving a net worth of this business of $12,000.

And if you and I were going out tomorrow to purchase this business, and saw every figure that we saw in this courtroom, and heard every statement made by Mr. Peterman in relation to his business, to the quarrels with Mr. Wysinger, to the quarrels with the industry, to the false statements he filed with the Postal Authorities, wouldn't you, as reasonable people, conclude that the figure that you would like to pay for this business is a lot closer to the 12 than it is to the 250? And if you were advising someone to buy a business, ask yourselves whether you would offer a figure closer to the 12 or closer to the 250.

And finally, ladies and gentlemen, I think that my statement made in opening that the owner drivers of this City as represented by ITOC and the constituent members feel that this case is an important, significant, First Amendment case, bears some explaining.

We go back in this industry with even our own little publications for almost 25 years. The case before you involves an essential question of whether we will be allowed to continue, in essence, thinking our own thoughts, writing our own periodicals, joining together in our own associations, picking and choosing our friends and supporters, or are we going to be at the mercy of the Les Peterman's of this world who will come into a courtroom and accuse us of an anti-trust violation whenever we don't agree with their way of thinking?

In essence, what we are asking you to do, ladies and gentlemen, is to take away from Les Peterman the shield and the sword that he used for one very simple reason: He betrayed the trust. He lied under oath. He lied to you again and again in this courtroom. And he did it for one reason: He did it for money, and he did it, whether or not he would hurt the Sal Barons of this world, the Al Zeffs of this world, or the Al Marks of this world.

And we are saying to you that the right of our clients, the rights of the men and women who work the streets of this city in cabs day and night, 365 days a year, are as important as the rights of any other citizen, and we are asking you to take away that shield from Les Peterman and to break that sword on the railing of this jury box and to tell him, as Walter Grimes told him back in 1964, "Mr. Peterman, there are no takers." This jury is not going to accept your story. This jury is going to send you away from this courtroom without a penny because you lied and lied and lied.

I know, I am convinced, ladies and gentlemen, that you will continue to give us the attention and the dedication that you have expressed over the past seven days. For that and for listening to me this afternoon, I thank you.

Thank you, your Honor.

THE COURT: Mr. Wentzel.

MR. WENTZEL: May it please the Court, madam forelady, members of the jury, opposing counsel, I want to thank you for listening with the patience and consideration you have given this case over the last week. I know the facts may be difficult to follow as they came in. We tried to shorten the case for you as much as possible, and sometimes that meant that things came in a little bit out of order and I am going to try to straighten them out for you now and I want you to understand that as I said in the beginning of this case that what I say is not evidence. What Mr. Nessen says is not evidence, and what Mr. McGrath says is not evidence. What you heard up there is evidence, and what you see in the exhibits, that's evidence.

Now, when I began this case, I gave you an opening statement, and I said that we would prove that the defendants conspired together to restrain the trade of Taxi Weekly, Incorporated by agreeing to cancel subscriptions, pressuring advertisers, spreading malicious rumors.

I said we would show attempts by the defendants to dictate the policy of this newspaper, and when that failed, that a sudden unexplained dispute arose between the two owners of the company, that cancellations occurred the day after all day meetings of the defendants, and that advertisers were pressured or influenced to drop out of the newspaper, and that all this action against Taxi Weekly eventually drove it out of business and silenced its voice after 33 years in the taxicab industry in this city.

Well, I think I have proven these facts and I would like to review them with you.

This case really starts in the spring of 1964. Taxi Weekly at that time was going along as it has for years and years. Its profits before owners' salaries were $57,000 that year. That ended in March, 1964.

Its advertising revenues were the best in its history, $64,000.

Mr. Peterman was the editor and publisher. He was running the business as he had for 7 years, since he had bought half of the stock from Mr. Wysinger in an agreement that permitted Mr. Wysinger to put in whatever time he felt like and required Mr. Peterman to devote his fulltime efforts to the company. In other words, since 1958 Mr. Peterman had been running that company and it was virtually a retirement agreement that had been entered into with Mr. Wysinger back at that time.

By 1964 Mr. Wysinger was 72 years old. He came in a couple of days a week in the spring and in the fall. Maybe three or four days a week in some of those weeks, as he testified. But he spent his winters down in Florida, and he spent his summers way out in Montauk.

There were no particular complaints. There were no disputes going on at that time. In fact, with respect to the fleet owners, a number of them, Mr. Plotsky, one of the defendants, and Mr. Murstein, and Mr. Heit, had recently sent in new lists of drivers that they wanted to receive Taxi Weekly.

In fact, Mr. Heit and Mr. Murstein increased their subscriptions. And you can see that right in the subscription book which is Exhibit BH in this case.

Now Taxi Weekly was a newspaper, and it went out under the name of Taxi Weekly and went out under the name of Taxi Age. You heard a lot about Taxi Age and the so-called

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dramatic developments of Friday and Monday about that. You know, when you have a really bad case you look for an issue that you can scream about, and here is an example of an issue that's as phony as one that ever lived. Taxi Age and Taxi Weekly. The very same paper. I showed you examples of how even when the masthead was Taxi Age, it called itself Taxi Weekly and the letters and things that came in. When the advertisers signed up with Taxi Weekly it went out in the newspaper whether it was Taxi Age or Taxi Weekly, made no difference. It was one newspaper.

And this is no sudden thing for the defendants, as Mr. Nessen would suggest. Why, the fleet owners themselves, the very members of Metropolitan, knew all about Taxi Age back in 1964. They got it. They knew it was the same as Taxi Weekly. And you can look at the cancellation letter of Mr. Rosenbloom, who was the secretary-treasurer of the Metropolitan Taxicab Board of Trade on July 14, 1964 when he writes to Taxi Weekly, and says, "Please discontinue making bulk deliveries to our garage of Taxi Age."

Taxi Age was a name that had existed since 1933. Sometime around 1945, according to Mr. Wysinger, he started Taxi Weekly. He carried the two names on before Mr. Peterman's time, Mr. Peterman continued that on.

Now, circulation was about 11,000. The defendants have thrown an awful lot of numbers around but I have yet to hear them say that the circulation of that newspaper was not 11,000. It was.

Taxi Age went out third-class as it should. A lot of them went free. Taxi Weekly went second-class. It was qualified to do so. In the mails.

Now, as you know, beginning in July 1964, the defendants started cancelling their paid subscriptions to this newspaper. And by 1965 a lot of that paid subscription was gone, and Mr. Peterman, in his statement of ownership in Taxi Weekly, made an incorrect statement in 1965. Now the defendants would have you infer that the 1964 statement must also have been incorrect. But you can see that that wasn't true because back in 1964 he had the paid circulation so there is no problem there. And they call him a liar. Well, I will say one thing, Mr. Peterman stood up there and he told the truth. Yes, he admitted it. How many of the defendants have you seen in this courtroom up there? I will get back to that point.

Now, back to the spring of 1964. In the news was the fare increase. You have all heard about that. There was a bill before the City Council but there hadn't been a hearing yet.

And if you look through the issues of Taxi Weekly in the spring of 1964 you will see it reported that the owner drivers had a meeting to protest the City Council's inaction.

On March 2nd Taxi Weekly noted that Mr. Schaffran, you may recall he was a former deputy mayor for Mayor Wagner, Mr. Schaffran had said publicly that the delay was caused by negotiations to insure that the fleet drivers received the increase.

And what did Taxi Weekly say about that? They said that's nonsense. In an editorial they said the fleets had already agreed to this a year ago. Let's get on with it.

On March 9th, Taxi Weekly carried an article explaining the fleets' position on the fare increase and how the benefits would go to the men.

On April 6th another editorial which said that the cost of living increase requires that this fare increase go through.

On May 11th Taxi Weekly noted that Metropolitan has pledged that all the fare increase will go to the drivers.

Article after article urging adoption of the fare increase, and following and urging Metropolitan's position. Seventy stories on the fare increase in the first six months of 1964 in Taxi Weekly. They are all in Exhibit 1.

But the bill was bogged down. Taxi Weekly complained about it, the City Council was wasting time, urged a hearing to get the bill passed. But it was bogged down. It wasn't going through.

And then a curious thing or things began to happen. First, Mr. Botwinick called a meeting with Mr. Peterman on April 17, 1964. And he demanded that Taxi Weekly follow the fleet line. He wanted him to go out and crusade. He wanted him to follow the fleet owners line closer than he had. "Don't report things people are saying against us. Just say the good things for us. Don't be an honest newspaper."

He wanted Taxi Weekly to attack Morris Marken. And then at the end of the conversation, and you recall Mr. Peterman made notes after that conversation, he had it written down. The exhibit is here somewhere. It is all yellow and dog-eared. It is 11 years old now.

He said that the grapevine has it that Mr. Wysinger and Mr. Peterman don't get along together, don't see eye to eye. Mr. Peterman told you that's the first time he had heard that. Oh, sure, two people in business together are going to argue about this and they are going to argue about that. Any two people will. But to the point of dissolving their own company? No suggestion of that.

And you had Mr. McIntire coming to Mr. Peterman and demanding that he print a press release as if it was Taxi Weekly's own views instead of attributing it to the spokesmen for the fleet as would be normal.

Well, what about this so-called dispute with Mr. Wysinger? It starts with a letter from an attorney, which is in evidence as Exhibit 2, and then a dissolution proceeding begins. Well, we went and asked Mr. Wysinger what is the story? I took his deposition and we read that to you yesterday, because he had put in these dissolution papers that Mr. Peterman was persona non grata with the fleet owners. And I asked him, who were they? What was the problem? And he said, "Oh, well, he wasn't really persona non grata. He had a lot of friends in the industry." That was something that occurred to him spontaneously at the time. It was just a perfunctory statement. He couldn't really name any fleet owners that were opposed to Mr. Peterman.

And he agreed that Mr. Peterman's position on the fare increase was the same as the fleet owners. The only problem he could come up with was some difference in opinion that he couldn't specify. You recall Mr. Zeff's deposition. He worked with these people. He didn't know what that dispute was about. He talked about an editorial where Mr. Peterman and Mr. Wysinger disagreed. Well, that editorial was on March 15, 1964.

And yet this dissolution thing started on May 20th, and Mr. Botwinick knew about it on April 17th, so it couldn't have been the editorial that started the dispute. In short, there was suddenly a dispute that wasn't any dispute at all. It had no background, it had no reason, it made no sense except that Mr. Botwinick knew about it before it happened.

And you recall Mr. Peterman's testimony of his conversation with Mr. Murstein in 1966. Mr. Murstein confirmed to him that yes, he knew something was being done with Mr. Peterman back in 1964 concerning that so-called dispute with Mr. Wysinger.

Well, Mr. Peterman declined to sell out to Mr. Wysinger, and the dissolution went to court, and the pressure continued to build for the fare increase. And then on July 10th Mr. Botwinick called up the leaders of ITOC, and we introduced the minutes of the ITOC meeting of July 10, 1964 where it states that Mr. Marks stated that Mr. Botwinick had phoned him and would like to meet with the council and the meeting was arranged at Mr. Botwinick's office on July 13, 1964, and I introduced the minutes of that meeting.

Held in Mr. Botwinick's office with Al Marks present and Sal Baron present, and others of ITOC present, and also George McIntire and Henry Friedlander and Ben Botwinick. They were all there on that day. Later that night Mr. Baron went back to his group and reported.

Now we have another stalemate as far as the increase goes. Mr. Botwinick just couldn't get the job done. Why do I say Mr. Botwinick couldn't get the job done? Because he was the executive director of Metropolitan. He was the spokesman. He was the leader of this fleet owner group. It was his job to get that fare increase through, and he wasn't getting the job done. So what did he do?

Well, Mr. Botwinick didn't come up here to testify today on defendant's case. Even though he has been sitting right back there and could have come up here to testify. I don't know what he is trying to hide, why he didn't tell you his story, or what his thinking was on that fare increase or what happened at that meeting on July 13th. But he chose not to do so. And you can infer from that what you like, because we do know what happened the next day. Eight fleet owners who had been subscribing for years and years, suddenly cancelled on one day. Mr. Heit, Mr. Marks, Mr. Plotsky, Mr. Naren, Mr. Schaffran, all called within a half-hour, and Mr. Rosenbloom and Mr. Murstein and Mr. Suchman all cancelled in that one day, and Mr. Lefkowitz the next day.

Now, these weren't just ordinary fleet owners who, because of some disputes with the men in the garage had just gotten sick of Taxi Weekly and decided to call up and cancel. That could happen any time and that's their right if they make an independent decision to do so, but these weren't ordinary fleet owners, just run of the mill members of the Metropolitan. Look at who they were.

Mr. Suchman was the president of Metropolitan and a director of it. Mr. Plotsky was the vice president of Metropolitan and a director, and the chairman of its executive committee. Mr. Rosenbloom was the secretary-treasurer and a director. Mr. Naren was a director of Metropolitan. Mr. Heit was a vice president and director of Metropolitan. Mr. Marks, Milton Marks, was a director of Metropolitan. Mr. Marstein was a director of Metropolitan.

You have a choice. You can either believe that by pure coincidence the same thought popped into the minds of all these people within the same half-hour in the same week and on the same day for all the reasons they gave in those depositions. We read those reasons so you could hear them. Or you can believe that they discussed together Taxi Weekly and that they agreed to boycott that organization. Some of them helped you out. Some of them were more candid than others in the deposition. Mr. Marks, for instance, admitted that he casually discussed it with some of the other owners. Mr. Plotsky admitted talking to Mr. Naren, Mr. Suchman and Mr. Rosenbloom, although Mr. Naren and Mr. Suchman denied talking to Mr. Plotsky. You talk about people denying things under oath. You think about that.

There is no doubt that a conspiracy was formed there. There is no doubt at all. The leaders of that industry, meeting together, the cancellations the next day, and look at who those people were.

Now, the cancellations didn't stop. There were seven more on Thursday, July 17th. Did those seven suddenly get a brainstorm out of the heavens to cancel or did someone lean on them and say hey, the directors of Metropolitan say get with it, get out of Taxi Weekly. By Monday, July 20th, just six days later, 22 fleets had suddenly had this lightbulb going off over their heads to get the idea to cancel. Forty-two percent of Taxi Weekly's circulation income was destroyed by that conspiracy right there in six days.

In six months it is gone, 65 cancellations out of 72, almost all of the fleets. All members of Metropolitan.

Now, later that fall this dissolution business with Mr. Wysinger was resolved. Mr. Peterman bought Mr. Wysinger's half of the stock for $50,000. At the time 50 percent of the circulation of that company, of that newspaper was gone.

Now, Mr. Nessen would suggest that Mr. Peterman was trying to buy a lawsuit. Is that why he continued to run the business for two more years? Is that why he suffered losses and took himself off the payroll which you can see in these financial statements?

Is that why, in an effort to save money for this company he had to file a false statement with the Post Office? Is that a man who is trying to buy a lawsuit? If he wanted to buy a lawsuit he could have started a lawsuit right then and there because he had a good one.

Now, that $50,000 is significant here. Mr. Harnett says it means nothing. But you and I know that when an owner of a business, who knows about it, pays for half that stock, it's got to mean something. He's the man that knows most about it, and he spent $50,000 for half the business at a time when it had been severely damaged.

Now, of course Mr. Nessen refers to the September 21st policy statement. Well, I heard him read that statement. It sounded to me like something any editor or publisher of any newspaper would say. He didn't declare war on anyone. But in any event it came out that way in September and it certainly doesn't provide an excuse for the defendants' cancelling back in July.

Well, then the fleets decided that they couldn't get along without a newspaper. They needed someone. There was a need for communication, as Mr. Kobak said.

So they get Mr. Zeff. And what does Mr. Zeff do? He tries to steal the subscription list. Mr. McGrath told you I haven't proved it. It is a little difficult to figure how much more you could prove it than the testimony of the man himself who admitted that he asked the lady that worked in circulation to take it for him, to get it for him, and Mr. Peterman testified he caught her red-handed. If that's not proof, I don't know what is.

And you heard Mr. Peterman's testimony that despite the fact that Mr. Zeff had never been in the advertising end of the business, had always been in the writing end, suddenly he found mail coming into Mr. Zeff from advertisers.

And when they started the Hackman, they did it, he did it with who other than the public relations man for Metropolitan, Mr. McIntire.

Let me just say a word about Mr. McIntire. You know, Mr. Nessen told you at the beginning of the case he was going to prove that Taxi Weekly was the organ of the fleets, the handmaiden and so forth. He never did. But I will tell you, if Taxi Weekly was supposed to be the spokesman and the organ and handmaiden, why would they need Mr. McIntire to be the public relations man? It doesn't make any sense, does it? But here is this public relations man and he is a spokesman, organ and a tool of the fleets, and he puts this money into Hosynd Publications, and they form the New York Hackman, but he does it secretly, he doesn't want his name up on the masthead so everybody can see and want to give this propaganda sheet to the drivers without them knowing just where it comes from. This was the kind of thing that they wanted Taxi Weekly to be and which it never was.

Well, at this point in time Taxi Weekly was still in business, it had advertising, it had a lot of it, it was reaching the owner drivers. And the advertisers wanted to reach the owner drivers. Those are the people that the taxi meter folks and the automobile dealers and what have you, those are the ones they want to meet. Those are the ones they want to get their ads across to, all those individual buyers. What better way than the newspaper that they all read. But despite the fact that Taxi Weekly was still reaching those owner drivers, advertisers began to cancel.

Now Mr. Nessen tells you that's a logical consequence of losing circulation. When you are trying to reach owner drivers and you are reaching owner drivers and the circulation that's last is fleet drivers, it is not a logical consequence that those people started to cancel. Not by any means.

Future Motors was one of the first to cancel. They cancelled, cut back in December 1964 and cancelled in February of 1965 as shown in Exhibit 111. It was right at the end of the year, and as Mr. Peterman testified, under the terms of their contract to put advertising in Taxi Weekly, they were short rated. In other words, they had to pay a rate that they would have paid for less advertising. And as a consequence, if they had just kept that ad in it would have been virtually free compared to the price that they had to pay by taking it out and being shortrated. That's not a very sound business judgment unless you have got some other reason for making it.

Let's take Chrysler Corporation. We have Mr. Zeiler. He came here and testified. We called him. And Mr. Zeiler, when he was up there on the stand, couldn't remember much of anything. And I will excuse that. It was 11 years ago. He remembered a lot better when his deposition was taken back in 1969, in January of 1969.

And you recall he was asked and this is the same passage Mr. Nessen read, "What did they say," and at this time he is talking about customers of Mr. Zeiler, "What did they say about Les Peterman and Taxi Weekly at that time?"

"A Everybody had different complaints in regard to our advertising in the paper."

And then you recall Mr. Zeiler a little later in that deposition was asked:

"Q Does that refresh your recollection that you told Mr. Peterman that the Narens were in the forefront of talking to you as a representative of Chrysler about Mr. Peterman and Taxi Weekly?

"A I have had conversations with them.

"Q With the Narens?

"A Concerning Peterman, right.

"Q What was said in those conversations?

"A They were unhappy. That's all."

And Mr. Nessen read you the passages where Mr. Zeiler denied that he was being pressured because "there was no pressure on me, it was just some people telling me that they didn't like my advertising."

And he denied that he was being pressured and he said he couldn't understand it because he wasn't the one that handled advertising for Chrysler. But he was the one who sold Chrysler automobiles to the defendants. He was the field man in New York. We certainly established that when he was here because he knew that.

And he couldn't recall if he told his boss, the regional manager whom he had shared an office with, about these conversations with Mr. Peterman.

So we have to look at the events, at the results. What happened next? Mr. Peterman got a call from Detroit, a couple of telephone calls from Mr. O'Leary and Mr. Passowitz of Burbar, Barton, Durstein & Osborn, the advertising agency for Chrysler that handled their products out in Detroit, and they were calling to cancel an ad that Mr. Peterman hadn't even received yet. They were in such a rush to cancel that advertising. And again they were short rated.

Now, Mr. Zeiler says, "Oh, well, we were cutting back on all our advertising." Just the month before they had placed a contract with Taxi Weekly for a 13 time advertising scheduled for a whole year.

And Mr. Peterman was asked, "What is this rumor about Morris Marken?" Well, you heard Mr. Zeiler say that he was the one that heard that rumor. How did it get to Detroit if the field man of Chrysler didn't tell him. Mr. Zeiler was the field man. And Mr. Passowitz said this rumor came from the field.

And then we have Rockwell Taxi Meters, who cut back in March 1965, and cancelled the next January. Mr. Nessen read a number of pages from that testimony, and he suggested that I read page 36, I don't know why. I will read page 7. Just listen to this. This is Mr. Moore who ran the office of Rockwell out there in Queens:

"A At that time he," referring to Mr. Lefkowitz, one of the defendants, "at that time he asked me why we were still, I am trying to remember the right word, why we were still advertising in Taxi Weekly. Didn't I know that that was no longer a fleet newspaper?"

Well, what did Mr. Moore do? What result? What impact did Mr. Lefkowitz have on Mr. Moore? Well, that we found out from Mr. Ulrick. We read his deposition yesterday because he is well out in Illinois now.

Mr. Ulrick was Mr. Moore's boss. And what did Mr. Ulrick testify to? He said this:

"Q What were you going into is what you said there was the fact, was it not, that the --"

THE COURT: Let's just take a stretching point here. Let's just stand up.

(Break.)

MR. WENTZEL: Mr. Ulrick's testimony:

"Q What were you going into is what you said there was the fact, was it not, that the taxi fleet owners had been talking to Moore and Moore did talk to you about cutting down your ads in Taxi Weekly because the taxi fleet owners wanted you to, isn't that a fact?

"A Must have. Yes."

Future Motors, Chrysler, Rockwell. Exhibit 29 shows how much every advertiser in Taxi Weekly paid them month by month. It is all broken down. If you added them up you would find it came to $7,845 for those three companies, just those three accounted for 12 percent of Taxi Weekly's advertising revenues in 1964. Wiped out by the defendants.

And other advertisers followed. Ebett's Field Dodge, who had the connection with Chrysler, whatever it was that Mr. Saslow testified to.

King Ford, Treemont Chevrolet, Ace Dodge, Bob Hurst Dodge, all cancelled.

Now, what about these advertisers? Because they did deny pressure. Well, they are competing for business in this city, in the taxicab industry. They were in 1964. They were when the depositions were taken. The defendants are their customers. They depend on those defendants for their living. Mr. Lefkowitz, as Mr. Moore said in his deposition, Mr. Lefkowitz was his biggest customer. Mr. Zeiler said taxies were a very large portion of his business. These people are understandably reluctant to accuse a customer of pressuring them. And they are understandably reluctant to admit that they as businessmen would permit themselves to be pressured. I can understand that.

And that's why it is very difficult to prove a conspiracy case because people don't go around saying, "Hey, let's conspire against Les Peterman." They don't go up to advertisers and say, "We are engaged in a conspiracy against Mr. Peterman and we want you to take your advertising out." Of course they don't. Things are not that simple. It is always very subtle.

And what is said is subtle. But it doesn't take much imagination if you are trying to get business from a man and he says, "Why are you still advertising in Taxi Weekly? Don't you know it is not one of our papers any more?" It is not hard to get the message, is it? And you have got to judge the effect of those statements by the results.

Chrysler did cancel. Chrysler dealers did cancel. Rockwell did cancel. Other advertisers did cancel. And, you know, in some of the cases it wasn't just outright pressure like that. You heard a lot about this Morris Marken business. Mr. Zeiler mentioned that. That's a very, very devastating way to really put it to a newspaper in this industry in New York because we have heard an awful lot about Mr. Marken and we know he had a pretty wild reputation and some people very obviously very much against him for one reason or another and to suggest that Taxi Weekly was backed by Morris Marken is a disaster when that newspaper is trying to get advertising from Chrysler, and Chevrolet, and Ford, and other companies. They don't want to advertise in a newspaper that is backed by their biggest competitor. Of course not. That's why that rumor was so devastating to the Taxi Weekly's business.

And what about the rumor? Well, the rumor just had no truth to it at all. Mr. Peterman has come here and told you he owned the stock of that company. He told you his father put up the collateral to buy it. Morris Marken did not have any interest in that company. Mr. McGrath says oh, but look, Morris Marken advertised. Sure Mr. Peterman will take advertising from any automobile manufacturer whether it is Checker or Chrysler or anyone else.

We heard this rumor from a large number of persons. We heard it from Mr. Baron. He admitted circulating it. We heard it from a number of the defendants, Mr. Murstein and Mr. Marks and those conversations that Mr. Peterman had with them.

But what finally happened as a result of all this? The squeeze and squeeze and squeeze until finally Taxi Weekly was forced out of business. Its circulation was lost. Its advertising revenue was wiped out. In 1966 it suffered a loss. The magazine, Taxi Industry Auto Rental News was wiped right out with it.

Now it is very clear, I think from this evidence, that the magazine was a small magazine, but when it was run in conjunction with this newspaper, it was able to generate profits, to add to the profits of the corporation as a whole. But that magazine, if after the newspaper went down the drain, if you had tried to run it all by itself as a separate business you couldn't do it because as Mr. Peterman said, the revenues generated out of that magazine weren't enough to pay all of the rent and all of the salaries for the staff and all of the other costs and overhead that are necessary to run the business. The expenses would have been too much, so the magazine was forced right out of business along with the newspaper.

Now, it is my job to prove, and it is your job to consider all the evidence against each defendant in this case, and I would like to run through them quickly so that there can be no doubt in your mind that there is evidence here against each defendant.

We will start with the fleet owners, Mr. Plotsky. He cancelled July 14th. The vice president of Metropolitan. He admitted discussing these cancellations with Mr. Naren and Mr. Suchman and Mr. Rosenbloom. And he cancelled at a time when he had just sent in a new list of drivers. He did not have any long standing feud with Mr. Peterman or with Taxi Weekly.

Mr. Suchman, he cancelled July 14th. He was the president of Metropolitan. He would have you believe it occurred by coincidence that this very same day Plotsky cancelled, he cancelled. The truth is, as Mr. Plotsky testified, that they got together and discussed it, and the facts showed that they agreed and conspired to boycott Taxi

Weekly. And Mr. Suchman, even in 1966, when Mr. Peterman came around to him, he would not re-subscribe. He told Peterman he had to go see the executive director of Metropolitan if he wanted to get back in the good graces. In other words, these people wouldn't make an independent decision of their own whether they wanted to take his newspaper or not.

Mr. Naren cancelled on July 14th, within five minutes of Mr. Heit and Mr. Schaffran. He too was a director of Metropolitan. He bought Dodge cars from Future Motors. Do you recall Mr. Zeiler's testimony that it was Mr. Naren who talked to him and said he was unhappy about Taxi Weekly? Why would he say that to Mr. Zeiler, other than for any other reason than to get him to get that advertising out of Taxi Weekly so that he could just get rid of that newspaper and get it out of the industry? Of course, we don't know what went on in Mr. Naren's head because he didn't show up here at the trial and testify and tell you. He didn't show up to deny that he talked to Mr. Zeiler and subject himself to cross-examination right up there where you could look at him.

How about Mr. Murstein? He cancelled on July 14th, a director, a member of the executive committee of Metropolitan. He said in his deposition he couldn't recall the reason for cancelling. But you know, he put his finger on the attitude of these fleet owners in his deposition. He said that he didn't care. He was going to follow the decision of Metropolitan. He was going to let them make up his mind for him. Somewhere up there like Mr. [illegible]winick said do this and he jumped. That's his attitude. And again the Zeiler testimony when Mr. Murstein had talked to Mr. Zeiler about Taxi Weekly, and Zeiler suggested that Mr. Peterman go see Mr. Murstein, and Mr. Nessen ridicules that and says that's what Mr. Murstein gets for being a charitable person. Where is Mr. Murstein? Why doesn't he come here and explain just what he had in mind? And again, Mr. Murstein, when he talked to Mr. Peterman, said that yes, he knew something was being done to Mr. Peterman about this Wysinger business back in '64. Mr. Nessen says oh, I don't believe that. Mr. Peterman lied and he lied and he lied. Well if that is so, where is Mr. Murstein to tell us what was said in that conversation?

Mr. Schaffran, July 14th, cancellation within five minutes of Mr. Naren and Mr. Heit. He said he cancelled after his drivers had been discussing the fare increase over several days, and yet in that five minutes it suddenly occurred to him that he should cancel. Well, he carried the banner one step further. He refused to give Mr. Peterman his side of a union dispute at his garage. What is he afraid of? Why can't he tell the news to a news reporter or does he just want to not let Taxi Weekly have anything? Don't do any business with him? Boycott him? Don't have anything to do with him? Well, he too failed to show up here and explain just what the circumstances were.

And Milton Marks who cancelled on July 14th, a director of Metropolitan. He admitted to casual conversations with other fleet owners about cancelling. Well, they may have been casual to Mr. Marks but they weren't casual to Taxi Weekly. The result was to deprive Taxi Weekly of a chance to compete openly, fairly. He told Mr. Peterman he couldn't re-subscribe in 1966 on his own, even though he had nothing against Taxi Weekly and thought it was a good paper.

You know, this demonstrates how a conspiracy restrains trade. We are supposed to be free and independent agents, free and independent people. We make our own decisions. If I think my business needs that newspaper, I will buy it. I am not going to limit myself by agreement with ten other people not to buy it. I will make my decisions for my business. That's the way this country is supposed to work.

Morris Heit. Milton Marks. Let me just finish with him. Milton Marks has been sitting in this courtroom throughout the trial. Did he get up on the stand and testify? No. He told you nothing. He is satisfied to have his deposition read.

How about Morris Heit? He cancelled on July 14th.

He was a director and vice president of Metropolitan. All these directorships, all these officerships are right here in these exhibits. They are all in evidence. They are the minutes of Metropolitan. They show who was elected to what position.

THE COURT: We will take a short break now.

(Recess.)

MR. WENTZEL: May it please the Court, let me just continue with these defendants now.

We have Mr. Lefkowitz, cancelled the day after some of these others did on the 15th of July. He was a director of Metropolitan. You recall he is the man who talked to Mr. Moore. We didn't read his deposition. There wasn't a word of testimony in this court from Mr. Lefkowitz. A statement by Mr. Moore stands uncorrected and unchallenged. No one has denied it.

Take Mr. McIntire, the PR man from Metropolitan who surreptitiously founded the New York Hackman. He didn't want the drivers to know it was being run by a press agent for Metropolitan. He didn't want people to know it was just a propaganda sheet to be used to oppose the union. He tried to force Taxi Weekly to print a press release as if it were its own words. He's the man who was the partner of Mr. Zeff who tried to steal the subscription list to start that newspaper.

And with respect to Mr. Zeff, it is an interesting point that he should try to steal that subscription list. Why would that be important to him? He knew who the fleet owners were. That's easy. Maybe he wanted to get that list because that list would contain all the owner drivers that Taxi Weekly was reaching, and he never reached.

And Hosynd Publications, of course, that's the vehicle that Mr. Zeff and Mr. McIntire used to set up this propaganda organization for the fleets. It is responsible for the actions of its officers and the officers were McIntire and Zeff.

How about Mr. Botwinick? Mr. Botwinick was the ringleader if anyone was. He was the executive director of Metropolitan, he was its spokesman. As I said before, his job was to get the fare increase and was going badly. So what happened? Well, why did he go after Taxi Weekly? Mr. Botwinick has been sitting in this courtroom and none of his testimony has been read. He didn't take the stand to tell you of his actions, to tell you what happened at that meeting of July 13th with all the leaders of the industry, including the owner driver groups. He didn't deny there was a conspiracy. So what did he do? I think he cast out just looking for someone to blame. He wanted a scapegoat. He wasn't getting the job done and he had to have someone to blame, so who should he blame but the bearer of the bad tidings, I suppose. Taxi Weekly was reporting the facts and the facts were that the fare increase wasn't going through. There was nothing else to report.

So he went after the newspaper that was reporting those facts. He was the one who tried to pressure Taxi Weekly into reporting only Metropolitan's views. He was the one who somehow knew of the Wysinger-Peterman dispute before even Mr. Wysinger or Mr. Peterman. He was the one who held meetings in his office the day before those cancellations. And he was the man that everybody said, "You got to go see Botwinick if you want me to re-subscribe to your paper."

The Metropolitan Taxicab Board of Trade, of course, is a corporation. It acts through its officers and agents, and we have sure seen it act through those officers, agents, directors, presidents, secretary, treasurer, vice presidents, executive director. That's the organization. Those are the men who were intimately involved in the decision making of that organization. And they made a decision to boycott Taxi Weekly and destroyed it.

Mr. Nessen would say, "Well, Metropolitan couldn't have been a party to this conspiracy because it didn't cancel until October."

Well, you heard that the copies of Taxi Weekly were needed down at the hack bureau. That's where they went and they still had to have them there. That's the only reason they didn't cancel.

Sal Baron, the head of UTOG. He attended those meetings with Mr. Botwinick. And he didn't come here to testify, either. He didn't tell you, "I didn't have anything to do with any conspiracy." Not even those simple words.

He was outspoken about his efforts to destroy Taxi Weekly in his deposition. He said, "I would have more than put him out of business." And he agreed that yes, he might have sold this people that Morris Marken was behind Taxi Weekly. And he said in that taped conversation, "He can't deny us the privilege of talking to those advertisers. People frequentl, [illegible]ere to hurt you."

What about UTOG? Baron was its head and we read you the portions of Mr. Baron's deposition where he testified that he was the spokesman for UTOG, and he carried out the policy of UTOG, and he attended meetings on UTOG's behalf.

Now, there has been an attempt made to cast UTOG in the role of a maverick. Well, there wasn't any maverick that Mr. Baron met in Mr. Botwinick's office on July 13, 1964. He was there. That's called fact, cold fact in black and white. He said so.

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The simple fact is that UTOG, through its executive director, tried to put Taxi Weekly right out of business.

The same is true with Alfred Marks, the president of the ITOC. He was there. And met with Mr. Botwinick. And he refused to give Mr. Peterman a simple statement as to UTOG's position, as to ITOC's position, and UTOG withdrew.

He just withheld the news from him. And of course both Mr. Baron and Mr. Marks, back in July of 1964, and Mr. Marks throughout the period, were officers of ITOC, and you may recall that I, after we had some testimony about how statements -- I should say -- about how Metropolitan and ITOC had never had anything to do with each other, had never liked each other, and owner drivers and fleet owners were completely separate, so I introduced meetings in July and August when they continued to meet. And Metropolitan, in 1965, paid $4,000 in dues to ITOC. What were they paying $4,000 to subsidize a rival group for, if they were so unfriendly?

Well, what is the defendants' position? It is very difficult to tell when their position is about this conspiracy because they didn't come here to tell you. Apparently they claim some sort of a right, a constitutional right, I think I heard it described as.

The basis of that right is that Mr. Nessen told you in his opening statement he would prove that Taxi Weekly was disloyal to the fleets. Well, when did he do so? I have just referred to all these articles one after another in the spring of 1964. Where is the disloyalty? Have you seen a single article pointed out that shows that Mr. Peterman changed the policy, that he went against the fleets? Not one.

Mr. Nessen said in his opening statement that he would prove that Taxi Weekly was subsidized by the fleets. Did he do so? The only thing we have seen Metropolitan or the fleet subsidizing is ITOC.

He said that Taxi Weekly was the fleet spokesman. And what was Mr. McIntire? What is this right that he claims? Is it the right to prevent a man from selling his newspaper to those who want to buy it? Is that the right? Is it the right to bar reporters from attaining news? Is that the right? Is it the right to spread untrue rumors to drive away advertisers? Is it the right to pressure customers so they won't deal with Taxi Weekly?

Is it the right to silence an old and proud newspaper and drive it out of this industry?

There may be countries where so-called rights like this exist, and history tells us that those kind of rights usually end up with thugs and stormtroopers in the middle of the night smashing things, but not this country.

Here a man has a right to earn his livelihood. He has a right to have his customers decide for themselves whether they want to buy his product. He has a right not to be ganged up on, conspired against and boycotted, and those rights are declared and have been declared by the Congress of the United States and the anti-trust laws.

Well, let's get to damages because that's really what the defendants have been talking about in this case.

First of all, there is no question here that Taxi Weekly was forced out of business, and there is no question that it was the defendants' act that did it. They started it with the ganging up and the cancellation of subscriptions. cost the revenue there, went after the advertisers cost them the advertiser revenues and down the drain it went. They drove the magazine right along with it. There is no question about that.

The only question here is what was the value of that business. What was it that Taxi Weekly had that was lost, that was driven out of this city by the defendants?

The most significant part of that proof is the financial statements of Taxi Weekly itself. What do they show? They show one very significant fact and that is the two owners of this newspaper, one of whom was retired virtually, were taking $57,000 a year out of that business. That was lost. All right. We brought Mr. Kobak in here.

And I have heard him belittled, accused of being a hired gun, and what have you this morning. Well, who is Mr. Kobak? First of all, he is a man who has devoted his whole professional life to evaluating publications. That's what he does for a living. He is not just a hired gun who testifies in lawsuits. He works for the very industry that's involved here. And I put in evidence this list of the sales that he has participated in. It was literally too long to go through while he was on the stand.

It is 140 companies. Well known publishers. McGraw-Hill, Dell Publishing, the big ones, reputable companies hired this man and want his opinion. Little One, Peter Ball, others that you wouldn't recognize hire him and want to know what he thinks.

Do you recall Mr. Harnett's statement to me this morning, I asked him, when he was with Cowles and they were making these acquisitions upon which he bases his expertise, well, did Mr. Harnett, "Did you make the financial analysis of those companies?" "No," he said. No. Someone else did it. And I asked him well, "What companies were acquired by Cowles when you were there?" And he told me about magazines for industry. Do you recall that name? Well, you know who Cowles Communications hired to evaluate magazines for industry? Mr. Kobak, it is right here in Exhibit 100.

I don't doubt that Mr. Harnett is well intentioned. I am sure he's very good at whatever he does in the marketing department or was when he worked for Cowles. But you could not get ten experts and add them all together in this industry and have the experience of Mr. Kobak.

And what did Mr. Harnett do? He didn't make any analysis of the quarter ending June 30th to compare it with the quarter before even though that quarter was right before the conspiracy.

He said he didn't know how to evaluate a partnership when I asked him. Then on redirect he said he didn't even know how to evaluate a corporation. Well, that's what we have been talking about for seven days in this case. He didn't know how to do it.

He didn't try to examine the profits to find out whether there was a limit of profit in here in addition to salary. He didn't look at the magazine. All we know is that Taxi Weekly wouldn't have fit in with Cowles. I concede it.

What did MR. Kobak do? Well, he tried to do, what he tried to do was to figure out what a willing buyer would pay to a willing seller at that time for this company. Now that's a fair way to evaluate a business.

To start off, you have got to figure out what the profits are. Everybody concedes the profits are important.

Mr. Harnett conceded that but he didn't look at them, Taxi Weekly was taxed as a partnership under the Federal tax laws.

Mr. Nessen says there are benefits. Of course there are. Those benefits are open under the laws of the United States to any small business that qualifies for them as Taxi Weekly did. They enable you to run your business tax wise as a partnership.

Now, when you are running a business as a partnership and take those taxes, it doesn't matter whether you call it salary, bonus, divident, profit, or what. You can put any label you want on it. You have got to pay a tax. That's how it works. So the fact that they put down here profits before owners' salaries, and then owners' salaries or bonuses or whatever, that has no meaning. We are not trying to deny something that we said to the tax people. All the tax people want to know is what's the profits before owners' salaries because that's what Peterman and Wysinger are going to be taxed on. We are not trying to change anything.

The corporation itself paid no taxes, the men who owned it did as if it was a partnership.

Now, what they received represented some limits of both the ownership aspects of the company and their labors. How do you determine what part is attributable to the work they did, the labor, the services they performed, and what part is attributable to the ownership part of the company? The profits. Well, Mr. Kobak thought that, he said the way to go about it is let me look at what other companies -- let me figure out what other companies of about this size paid an editor and a publisher.

Now, you say, well, that's not Mr. Peterman. But other companies were also successful, and the editor and publisher of those companies who were being looked at had qualifications and so forth just as Mr. Peterman and Mr. Wysinger did, so that they earned their salaries.

What did other people pay these companies? His thought was, and he was in this business in '64, he remembered the stock was about $15,000. He didn't just stop there and say that's it. I'm going to give my opinion and rest. He went back and he checked the numbers. He had surveys and studies and they show exactly what a proper salary was, and he was right. It is about $15,000. Well, then you recall he went through the figures.

He had the man power studies and so forth. And they showed the medium and lower half of the range was about 17,500. Taxi Weekly he thought was below even that medium range so 15,000 was about right. And of course, that's verified right in this case by Mr. Peterman's own salary before he became an owner, of about $6,000 a year.

Now, you may say that 15,000 doesn't sound like much, but this was 11 years ago, so it is verified by the figures, by the facts.

You may think well, what about Mr. Wysinger. Are you going to have to replace him too? He was inactive at the time and Mr. Peterman was able to run the business after he left just as Mr. Zeff was able to run the Hackman all by himself.

So all right. You figure 15,000 represents the salary part of it. That's the labor that went into it, going around and getting the advertisers and so forth. Writing stories, or whatever.

And you deduct that from the 50-odd thousand dollars gross profit that you started with.

And then Mr. Kobak did something else. He applied a provision for federal income taxes because in his view you have got to take taxes into consideration on an import basis when you are thinking of selling out to one of these big companies or so forth. They are going to have to pay taxes so that's the way they would look at it even though the business itself was run as a partnership.

So he then applied a provision, you recall the sheet that we all passed around of Federal taxes and it left an average profit, he took the three years, 1962 to '64, of $24,823 average. All right.

Then we turn this multiple business. You recall Mr. Kobak multiplied the average profit by ten in order to reach the value of the company. What does that mean? Well, if you are going to invest in a company and certainly you would pay more than $25,000 if you are going to get $25,000 right back in profits the first year. It is worth more than that as an investment. How much more? Well, the only way to find out is again look at the market place. What are people paying for publishing companies? And he found that the average was about 17 times earnings. Now he said wait a minute. Taxi Weekly is a little tiny company. It is in a business that doesn't have much growth. It is privately held. And he discounted that 17 by 40 percent, and of course when you muitiply out you are taking the actual profits of Taxi Weekly, so if they are small, the figure is going to be small.

It was this man's opinion, and this man is the leading expert in this industry, that that business was worth 10 times earnings. $248,230.

Now you might say to me, Hey Wentzel, what if we disagree on this $15,000 figure? What if we think Peterman was only worth 13,000, or what if we think he was worth 17,000. How are we going to figure that out in all this complicated formula. Well, if the salary was less, the profit are greater, and at the 50 percent tax bracket if you add or took $2,000 off that salary, half of that would go to taxes, so you would have an extra $1,000 in profit, and you would just multiply that out by 10 and you would add $10,000 to the value of the company. If you thought Peterman was worth 17,000 or if you thought it would take 17,000 to get an editor and a publisher in there, that's $2,000 more than Mr. Kobak figured.

A thousand of that would be attributable to taxes. The other thousand would be multiplied times 10. You would deduct $10,000 from the value.

Now I have taken you all the way through this case. I just want to say a few words in conclusion. First of all, I think we have proved beyond a shadow of a doubt that the defendants and each and every one of them conspired to put Taxi Weekly out of business. They had no right to agree to boycott Taxi Weekly so it couldn't sell to those who had nothing against it or those who wanted to buy the newspaper. They had no right to pressure advertisers not to do business with them. They had no right to injure Taxi Weekly's business by spreading false rumors about Morris Marken. And they succeeded in their conspiracy. They drove the paper into the ground. They deprived Mr. Peterman of his livelihood. The business is gone.

And I will say that in this country from the days of John Peter Senga to the Pentagon papers, we have had a tradition of free speech and free press. We can agree or we can disagree with our neighbor and we can do so publicly. We can read what he prints or we can not read what he prints just as we choose.

But all of us, and each of us is protected from any group no matter how large, no matter how powerful, from conspiring against us, ganging up on us to deprive us of our business, of our livelihood. These defendants engaged in such a conspiracy. I ask you to return a verdict against each and every one of them in the amount of $250,000.

Thank you.

THE COURT: Ladies and gentlemen, thank you

Thank you gentlemen for your summations.

We will adjourn now until tomorrow morning, and because of some other necessities of my own time, I will ask you to be in at 9:30 and I will start the charge promptly at 9:30 without delay.

So I will see you at 9:30.

(Adjourned to Wednesday, July 16, 1975, at 9:30 a.m.)

* * *

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TAXI WEEKLY, INC.

Plaintiff

66 Civ. 2827

vs.

METROPOLITAN TAXICAB
BOARD OF TRADE, INC., et al.

Defendant

July 16, 1975
9:30 a. m.

CHARGE OF THE COURT
HON. THOMAS P. GRIESA, JUDGE

THE COURT: Before I start the charge, I wish to thank each of the lawyers who has handled the case, and each of their assistants. They have done an extremely able job. They have been helpful to me in expediting the trial in every way, and they really deserve my gratitude and the jury's gratitude.

Now, ladies and gentlemen of the jury, we come to the final function which you, the jury, and I, acting as the court, must perform. I charge you at this point on the law, and it is your duty to follow this law as I instruct you even though you may not happen to agree with it.

Now, this jury charge is somewhat long and, by and large, it is something that I have to read. I wish that I could simply talk to you. I think that might be

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more interesting and lively for you but I really can't do that so you bear with me, pay the closest attention you can, and try to understand the charge as I give it to you.

You, as the jury, are the exclusive finders of the fact. You determine the credibility of the witnesses. You resolve the conflicts in the evidence. You decide what inference can properly be drawn from one fact in evidence to some other contested issue of fact.

Ultimately, you apply the rules of law I give you to the facts as found and determined by you and arrive at your verdict.

Now, your verdict will take the form of answers to specific interrogatories, and I will read you each of those questions or interrogatories at the appropriate point in my charge in connection with the subject to which that particular interrogatory relates.

Now, your factual determinations are based on the evidence adduced in court. This evidence consists of the live testimony of the witnesses in court and also the testimony of other witnesses through depositions.

The evidence also consists of exhibits introduced into evidence, and also any stipulations of fact.

You were asked during summations to draw inferences from the failure of certain defendants to

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testify at the trial. I instruct you that if you believe that it would have been appropriate for a defendant to testify at the trial, had that defendant been able to testify favorably to his case, you may but you are by no means required to draw an inference that such defendant's testimony, if given, would have been unfavorable to his case.

This matter of drawing such an inference, like all matters of fact and evidence, is for you to determine in your own good judgment.

Now, I think it goes without saying that you are to approach your function in an attitude of absolute impartiality and fairness. All of the parties are equals before you and equals in this court of law. There must be no difference in treatment whatever because some parties are individuals and others are corporations.

An individual and a corporation, rich and poor, are entitled to the same fair and impartial treatment by you, the jurors.

I mentioned at the outset of the case that the case is to be decided on the law and the evidence, and that excludes, as a basis for decision, any emotion, any attraction to one party or bias against a party, any kind of feeling of sympathy or hostility for or

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against any party.

The attorneys have delivered their summations describing what each one contends has and has not been proved in the evidence, but statements of attorneys are not in themselves evidence.

If your memory of the evidence differs from what an attorney tells you, it is your memory that governs.

During the trial I have made various rulings and remarks, and I have occasionally asked questions. You are not to take anything I have said during the trial, or anything I say in this charge, as indicating any view of mine as to what your verdict should be.

You have your function in this case and I have no intention of treading upon it whatever. By the same token, I have my function and I know you will respect that and you will follow the rules, as I give them to you, faithfully.

The claim in the present case is by Taxi Weekly, Inc. You should keep clearly in mind that this corporation is the Plaintiff rather than Mr. Peterman, individually. When I refer, from now on, to the plaintiff, I will be speaking of the corporation Taxi Weekly, Inc.

The plaintiff claims that there was an

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unlawful combination or a conspiracy against it in violation of both the federal and the New York State antitrust laws. I will read the relevant statutes to you in a minute and describe the elements of the claims in detail, but in general, the plaintiff contends that beginning in late spring of 1964 and extending through about the middle of 1966, the defendants combined and conspired to damage the business of the newspaper, Taxi Weekly.

You have heard evidence about the fact that there are Taxi Weekly and a Taxi Age. For the sake of convenience, I will usually refer, in this charge, to the name Taxi Weekly only. Later in my charge I will discuss the specific questions relating to these two papers or the use of the two names. But without in any way attempting to ride over any problems that may exist in that regard, for the sake of convenience, I will simply refer to Taxi Weekly when I'm talking about the paper or papers. I will do this in general in my charge.

Going on with the general description of the claim here, the plaintiff contends that the alleged combination and conspiracy not only put the newspaper or newspapers out of business but was also the direct cause of the entire corporation going out of business along

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with the monthly magazine called Taxicab Industry/Auto Rental News.

The plaintiff contends that it has sustained monetary damages equal to the value of the corporation as it existed prior to the alleged conspiracy.

Now, I instruct you that the plaintiff has the burden of proving every essential element of his claim including the burden of proving the quantum of damages, if any.

What does it mean when we say somebody has the burden of proof? In a civil action, the party who has the burden of proof must prove his case to the jury by what we call a fair preponderance of the evidence. The word "preponderance" I suppose is the most important word here. What it means is weight.

If you weigh or mentally evaluate the evidence on both sides of the case, all the evidence, the plaintiff, on any essential issue, must convince you that the weight of the evidence or the preponderance tips in his favor.

Now, we are not talking about the number of witnesses. We are not talking about the quantity of proof; how many hours or days a party took. We are talking about the convincing quality of the evidence.

In your deliberations you should think, in

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connection with any point you are considering, what the evidence is for the plaintiff; was the evidence against the plaintiff or for the defendants.

And then you will evaluate the evidence on both sides. You will consider and determine where does the weight lie.

Now, in this connection, I will use a familiar illustration that judges use. You have seen the old fashioned scales in a pharmacy or drugstore that were used at one time in weighing elements of a prescription. You have seen that on one side there is a pan and on the other side there is a pan to receive the weights. Now, think of such a scale perhaps for weighing the evidence in this case.

If, after considering all the evidence, you put the evidence for the plaintiff on one side and the evidence for the defendant or against the plaintiff on the other side, and if the scale tips in favor of the plaintiff, then the plaintiff has sustained his burden of proof.

It doesn't have to be a perfect case. The plaintiff just has to tip the scale in his favor even though slightly. That is what preponderance of the evidence means in a civil case.

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If, on the other hand, the evidence tips in favor of the defendant, of course, the plaintiff loses on that issue.

Where the burden rule probably becomes most important is a situation where the jury feels that the evidence is equally weighted, or where you feel the evidence is inconclusive, where there are just as many doubts on one side as on the other.

Then, in that case, where the weight of evidence or the doubts are evenly balanced, the plaintiff loses. He has not tipped the scales in his favor.

Now, let me describe to you exactly what it is that you must find that the plaintiff has proved before the plaintiff can recover in this case. First, here are the statutes involved. The plaintiff's claim of a violation of federal antitrust laws is based on Section 1 of the Sherman Act, and Section 4 of the Clayton Act, both passed by the Congress of the United States.

The pertinent language of Section 1 of the Sherman Act is as follows:

Every combination or conspiracy in restraint of trade or commerce, is declared to be illegal.

Section 4 of the Clayton Act provides for recovery by any person who shall be injured in his

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business or property by reason of anything forbidden in the antitrust laws.

The plaintiff makes an alternative claim under the New York Antitrust Law which is Section 340 of the New York General Business Law. The pertinent language of this statute is, "Every contract, agreement, arrangement or combination whereby competition or the free exercise of any activity in the conduct of any business, trade or commerce, or in the furthering of any service in this state is or may be restrained is hereby declared to be against public policy, illegal and void."

Although the federal and state statutes have somewhat different language, these differences of language have no effect in the present case.

For the purpose of this case, we will consider that the activities which are prohibited and made illegal by the federal law and by the state law are the same.

Therefore, in asking you to answer certain specific questions in the verdict form, I will not ask you to answer different questions under the state law and different questions under the federal law.

My instructions from here on out, as to the elements which you must find proved, will be general and will relate to both statutes, and the questions will be

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the same.

Now, as far as this case is concerned, the essence of what the law provides is this: that it is illegal to enter into a combination or conspiracy in unreasonable restraint of trade. I know that's making a very general and possibly vague statement, but in a moment we will try to bring it down to specific issues, concrete issues, in this case, but I want you to know the general framework we are talking about before we get to the specifics.

Now, the essence of a combination or conspiracy in violation of the antitrust laws is an agreement or understanding of two or more persons to carry out some common action in what we call an unreasonable restraint of trade. To constitute such a combination or conspiracy it is not necessary that the participants enter into a formal agreement or contract. It is enough that participants arrive at a common understanding or plan, expressed or implied, to carry out the illegal purpose.

Now, let me describe how these general concepts apply to the present case. This will involve describing to you in somewhat specific terms what would be legal, permissible conduct on the one hand and what would be illegal conduct or unreasonable restraint of trade on the other hand.

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When I describe to you a type of conduct in this connection, I am not, of course, saying to you that this or that actually occurred. I am trying to illustrate the boundaries between what would be illegal and what would be legal. It is for you, of course, as the jury, to find the facts as to what did occur, whether one thing or the other thing.

Specifically, it is for you to find if the plaintiff has proved that illegal conduct occurred.

Now let me start by illustrating for you what would be clearly legal, permissible conduct.

A person subscribing to Taxi Weekly had a legal right to disagree with Taxi Weekly and with Mr. Peterman, and to cancel his subscription to the paper.

It is also clear that subscribers to Taxi Weekly had a legal right to discuss with each other any criticisms or disagreements they had regarding Taxi Weekly or Mr. Peterman. They could do so legally within trade associations or outside of trade associations.

Indeed, subscribers to Taxi Weekly had a constitutional right to be free to exchange their views about what they considered the merits or demerits of Taxi Weekly and Mr. Peterman. And they didn't have to be right as to whether there was merit or demerit. They had a right to express their views and have their views and cancel their subscriptions whether they were right or wrong in their views; accurate or inaccurate.

Further, it is clear that subscribers of Taxi Weekly had a legal right to cancel their subscriptions after freely discussing their views with each other; indeed, a group of subscribers would have the right to agree that they would cancel their subscriptions if that agreement were the free choice of each one after a free discussion of the kind I am referring to.

Further, it was legal for persons who had canceled Taxi Weekly to discuss their views with still others, and it was legal for those others to cancel, again if this was all a matter of free discussion and action freely taken.

Moreover, there was nothing illegal in and of itself about any of the defendants sponsoring or setting up a new newspaper, The Hackman, or transferring their subscriptions from Taxi Weekly to The Hackman.

Now, the essence of what I have been telling you as permissible, legal conduct is the free expression of opinion, the free discussion of opinion, and the freedom to act in a natural way to carry out the views arrived at.

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Now, let us turn to defining what would be illegal conduct. I will put it in terms of what the plaintiff must prove in order to recover because he must prove by a fair preponderance of the evidence illegal conduct in order to recover.

In order to hold the defendants or any of them liable for an unreasonable restraint of trade, the plaintiff must prove by a fair preponderance of evidence the following:

The plaintiff must prove that there was a combination or conspiracy for the purpose of injuring or striking the plaintiff's business and that this combination or conspiracy was entered into in order to engage in at least one of the following specific activities.

Now, I think you will see here that there is a distinction between what I am defining as illegal conduct and what I described before as the free expression of opinion and free exercise of the right to cancel. I am talking, here, about something beyond that, and I am focusing on the intention to carry out certain specific types of activities which would be quite different from what I described before, and for the ultimate purpose, specifically, of injuring or destroying the plaintiff's business.

So it would be illegal to enter into such a

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combination or conspiracy for that purpose to carry out any of the following activities:

First, inducing the co-owner of Taxi Weekly, **Abraham Weisinger,** to dissolve the business.

Second, coercing subscribers of Taxi Weekly to cancel their subscriptions. In other words, on this second point, it would be illegal for a group of Taxi Weekly subscribers to combine, to coerce others to cancel their subscriptions against their free will under the guise of leadership of a trade association or in some other way. The important element here is coercion.

A third type of illegal activity would be activity designed to shut off the flow of news sources to Taxi Weekly if this was carried out pursuant to a combination or conspiracy.

A fourth type of illegal activity would be activity designed to shut off advertising from Taxi Weekly if this was done pursuant to a combination or conspiracy.

Again, I think you see that I am describing here as illegal conduct something which is sharply different from merely the free discussion and free exercise of rights to cancel subscriptions.

Therefore, you must determine whether the plaintiff has proved that there was a conspiracy or combination to

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injure or destroy the plaintiff's business by inducing **Weisinger** to attempt dissolution of the company, or by coercing subscribers to Taxi Weekly to cancel against their free will, or by shutting off Taxi Weekly's sources of news, or by shutting off Taxi Weekly's advertising.

Now, in order for the plaintiff to prove an illegal combination or conspiracy it is not necessary that the plaintiff prove that there was a combination or conspiracy to engage in all of the activities just mentioned. It would be sufficient for you to find that there was a combination or conspiracy to carry out one of the activities mentioned for the purpose of injuring or destroying the plaintiff's business.

As I have stated to you earlier, the plaintiff has the burden of proving the elements of its case by a fair preponderance of the evidence. This means that you cannot base a verdict in the plaintiff's favor on mere speculation or conjecture or suspicion.

Before you can make a finding in plaintiff's favor on any element or on any question, you must determine that there is credible evidence which logically and rationally supports a finding in plaintiff's favor and that indeed the fair preponderance or the greater weight of the evidence is in favor of the plaintiff's claim.

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As I indicated to you earlier in this charge, you will be asked to render your verdict in the form of answers to specific questions.

Question number one relates to the question of whether there existed the illegal combination or conspiracy.

Let me say here that there are two somewhat different elements here that I am going to ask you to answer questions on. (1) Do you find that there was an illegal combination or conspiracy among any two or more of the defendants? Just the question about the existence.

The second question will be, and I will describe the elements of this in a moment, it will relate to who, if any of the defendants became a member of that combination or conspiracy. There are many defendants here, and you must consider not only whether somebody entered into a combination or conspiracy, but you must, and this is a very essential part of your consideration, determine as to each defendant, if you find that there was a conspiracy. You must determine as to each defendant whether he or whether the corporate defendant joined in a conspiracy.

Therefore, two is a somewhat different question and must be answered differently. But in any event, let me read to you the first question which you will be asked to answer:

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Do you find that Plaintiff, Taxi Weekly, Inc., has established by a fair preponderance of the evidence that there was a combination or conspiracy during the time in question against the newspaper Taxi Weekly in unreasonable restraint of trade as defined in the court's charge? There are two boxes, one Yes, one No

Now, if your answer to question one is yes, and only if it is yes, you must then go on to determine which of the defendants, if any, were members of this combination or conspiracy.

In order for there to be an illegal combination or conspiracy, it is not necessary for all the defendants to be members. Some may be and some may not be. It depends on what the plaintiff has proved.

Mere similarity of conduct or mere membership in the same trade association, or attendance at meetings or discussions, is not enough in itself to prove the existence of a conspiracy or membership in a conspiracy.

Before you can find that a defendant became a member of an alleged combination or conspiracy, the preponderance of the evidence must establish that he knowingly participated in the unlawful plan with intent to further its objective.

On the question of membership, it is your duty

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to examine the proof as to each defendant separately. You should consider the evidence about the acts and statements of that defendant, and all the surrounding circumstances which logically relate to the question of that defendant's membership or participation in the alleged conspiracy. But you must consider this as to each defendant listed.

Now, you recall that at certain times during the course of the trial I accepted certain evidence subject to connection, and this evidence involved acts, statements or declarations made by one defendant in the absence of other defendants.

The acts and declarations were received in evidence against the particular defendant allegedly participating in the acts or making the statements. That was the primary reason for receiving such evidence.

However, with respect to the remaining defendants not present at those conversations or at those acts, this evidence was received conditionally subject to proof of the existence of some connection, particularly the existence of the conspiracy charged and absent defendants' participation in it.

Now, I instruct you that membership in a conspiracy by a particular defendant cannot be established

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simply by the acts or declarations of co-conspirators done or made in that defendant's absence.

This may be a little difficult to grasp but I think that it is essential and you need to consider it carefully.

Before you can find that the plaintiff has proved that a particular defendant was a member of the alleged conspiracy or combination, or participated in it, you must find that there is evidence, and it can be circumstantial or direct evidence--and I will define those terms later--but there must be evidence either in the form of direct testimony as to what he did, direct testimony of someone that heard him say something, a direct admission by that defendant, or evidence of circumstances which tend to prove that the defendant did become a member of the conspiracy.

As to each one you must consider, specifically, whether that has been proved, that kind of evidence.

If, in your considerations, you are relying on a statement, a hearsay statement by a defendant, say to Mr. Peterman--and I am using this hypothetically, I don't know whether it exists or not--you are considering that Defendant A, in a conversation, in 1966, told Mr. Peterman that Defendant B did something. Mr. Peterman then testifies about that conversation, now, that is nothing that Mr. Peterman directly heard Defendant A say. He only heard defendant B say that Defendant A did something.

Now, you cannot base a finding of membership in a conspiracy on that kind of evidence. You have got to have evidence directly that Defendant A said something, did something, or circumstantial evidence of that kind, not this kind of hearsay testimony that I am talking about.

Now, once you find that there was a conspiracy, if you do, and that a particular defendant was a member of the conspiracy, then, once you find that, you can consider all acts and all statements made by other conspirators in the course of the conspiracy as binding on everybody.

What I mean is this: let's suppose that you find that Defendant A and Defendant B are both members of a conspiracy. Defendant B goes off and does a particular act in furtherance of the conspiracy. Defendant A isn't present. Well, Defendant B is in effect the agent of Defendant A, and so Defendant A is liable for that act even though he wasn't present.

It is a little complicated but I think that's the best I can do.

Now, certain of the defendants are corporations.

Metropolitan Taxicab Board of Trade, Inc., Independent Taxicab Owners Council, Inc., or ITOC, United Taxi Owners Guild, Inc., or UTOG, and Hosynd Publications, Inc.

Metropolitan, ITOC and UTOG are trade associations. Hosynd published the paper, The Hackman.

Now, I instruct you that a corporation or trade association can only act through individual members. A corporation or trade association is responsible or liable for the acts of its officers or employees, or members done in the course of the business or activities of that corporation or association.

Now, returning to the second question in the interrogatories or verdict form as follows:

If your answer to question number one is yes; Do you find that the plaintiff has established by a fair preponderance of the evidence that any of the following defendants knowingly entered into such combination or conspiracy? Answer yes or no as to each defendant, and there is a list.

Now, with regard to the question of the existence of the alleged combination or conspiracy and the membership of the defendants therein, let me summarize some of the connections of the parties regarding the evidence.

I will not attempt to summarize or state all the connections or all the evidence. This would be impossible. You heard the evidence, you heard the summations of the attorneys, and I say to you that all the contentions and all the evidence are important for you to consider.

My purpose here in summarizing, as I do, is to mention some of what are, perhaps, the main points with the idea that this may crystallize for you the issues and with the idea that when I mention certain points, it may recall to your memory other points.

The plaintiff contends that the alleged conspiracy started in early summer or late spring of 1964 and that its first manifestation was inducing Weisinger to sue to dissolve Taxi Weekly, Inc.

This suit was commenced on June 15, 1964, one month before the fleet-owner cab's litigation started.

Peterman testified that there was no substantial dispute between him and Weisinger before this time, and, therefore, no valid reason for Weisinger to attempt a dissolution.

Peterman testified that when Botwinick told him, in mid-April, 1964 that Botwinick had heard of a dispute, Peterman was surprised to hear of such a thing.

Weisinger, now deceased, testified to the contrary in his deposition. **Weisinger testified that he** and Peterman couldn't see eye-to-eye, that their policies were entirely different, that Peterman was pushing to **buy Weisinger** out, that under Peterman's management, Taxi Weekly was losing business and not getting new advertisers, and that **Weisinger's dissolution suit was** the natural result of what was going on between him and Peterman.

Weisinger testified that no one suggested to him that he get rid of Peterman.

Alfred Zeff testified in his deposition that there was a dispute between Peterman and **Weisinger** on a number of matters.

It is for you to resolve the questions of credibility basically between Peterman and **Weisinger and** Zeff, and to determine whether there is proof by a preponderance of the evidence that the defendants or any of them, as part of a combination or conspiracy, procured or induced Wysinger to sue for dissolution in June of 1964.

The plaintiff next claims that the alleged combination or conspiracy to damage or **destroy Taxi Weekly** took the form of coercing subscribers to cancel their subscriptions against their will.

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It is appropriate here to refer to the matter of circumstantial evidence.

Plaintiff relies heavily in all facets of the case on circumstantial evidence, and I need to point out to you the difference between direct and circumstantial evidence.

Direct evidence is where a witness testifies, "I said something, I heard something, I saw something," or where a document reflects that something occurred.

Circumstantial evidence, on the other hand, is where one factor or a set of factors, circumstantially leads logically and reasonably to the inference that another fact occurred, even though no one has testified that they saw or heard that latter occurrence.

Suppose I see some fire engines rushing up to an apartment building and the firemen running in and five minutes or so later they run out or walk out, get into their trucks and go back to the station. Now, it may be reasonable, under all the circumstances, to infer that someone turned in a false alarm although I didn't see the person pull the lever, and I really didn't see exactly how it was that the firemen came to drive to that building.

I would be relying on circumstantial evidence if I could logically and reasonably draw that inference.

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Now, circumstantial evidence doesn't involve conjecture or speculation. In order to apply it validly you have to be able to draw a conclusion reasonably and logically from the circumstance. And when you can do that, circumstantial evidence is of no less weight than direct evidence.

Now, the plaintiff contends that five of the defendants, Heit, Schaffran, Haren, Marks, and Plotsky telephoned Peterman within a half-hour or so on July 14, 1964, canceling their subscriptions to Taxi Weekly, and that this followed certain trade association meetings the day before.

Murstein and Suchman also canceled on July 14, 1964.

Plaintiff asserts that this is all circumstantial evidence, that these defendants agreed together to cancel their subscriptions although no one has testified directly of such an agreement.

The plaintiff further contends that the fact that these defendants occupied certain leadership positions in Metropolitan, together with other defendants, specifically, McIntyre and Botwinick, that these circumstances, taken together with the facts about the pattern of what occurred in further cancellations of Taxi Weekly subscriptions

emb 26

by fleet owners, that all of this constitutes circumstantial evidence that the fleet owner defendants and Metropolitan, and Botwinick, and McIntyre were combining and conspiring to coerce others to cancel their subscriptions to Taxi Weekly.

Plaintiff also contends that some weight should be given to certain admissions which Peterman says were made by Murstein and Milton Marks to Peterman at a later time, indicating that they were following a line set by Metropolitan or its leadership.

In this regard, Plaintiff also contends that there was no actual dispute in the spring of 1964 between the fleet owners and Peterman or Taxi Weekly over the policies or conduct of the paper, that there was no bonafide dispute which would furnish justifiable reason or explanation, or realistic reason or explanation for the cancellations which occurred, and that, therefore, such cancellations could only have come about as a result of the illegal conspiracy and coercion on the part of Metropolitan and its leaders.

Plaintiff contends that McIntyre and Zeff established The Hackman pursuant to the conspiracy and refers to Zeff's attempt to obtain Taxi Weekly's subscription lists.

emb 27

Now, defendants, on the other hand, make several contrary contentions. First, they contend that the evidence about the alleged admissions of Murstein and Milton Marks occurred long after the events and are entitled to no weight.

Defendants also contend that there was a genuine dispute and antagonism between fleet owner subscribers and Peterman which naturally led to the disagreements and cancellations which occurred.

Defendants contend that certain fleet owners believed that Peterman was not covering the taxi fare increase issue fairly.

Defendants contend that Peterman was manifesting antagonism to the fleet owners and to Metropolitan as evidenced by his statement to McIntyre that Peterman wouldn't take any material that McIntyre furnished, thus depriving the plaintiff of a paid advertiser in the paper.

Defendants also rely on statements and answers published by Peterman in Taxi Weekly beginning in September, 1964 as indicating an antagonistic attitude of Peterman to the fleet owners.

Peterman testified on cross-examination that he and the fleet owners took a somewhat different stance on the unionization point in the spring of 1964.

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It is for you to determine, from all the relevant direct and circumstantial evidence, whether the plaintiff has proved by a fair preponderance of the evidence that any of the defendants participated in a plan to coerce Taxi Weekly subscribers to cancel their subscriptions.

I have instructed you already that it was the legal right of defendants to discuss together and with others any disagreement or dispute they had or thought they had with Taxi Weekly or Peterman, and they had the legal right to cancel their subscriptions or even agree that they would cancel so long as this was the natural result of free discussions and didn't involve coercion among themselves or others to enforce a line set by Metropolitan's leadership.

Let me return a moment to one facet of the circumstantial evidence problem.

If two reasonable inferences can be drawn from the circumstances proved by the evidence, one pointing to culpability and the other to innocent conduct, then it is your duty to infer that which indicates the innocent conduct. For instance, let us take the circumstantial evidence about the cancellations. It may be that you will find that it points to an inference of coercion, or it

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may be that you find it points to an inference of free action to remedy common-felt grievances or it may be that you will find that this evidence, without more, doesn't tell you one way or the other, then, unless there is some other evidence to tip the scale, you cannot resolve the question in favor of guilt or culpability.

What I have just said about evaluating evidence applies to all the issues in this case.

Now, the next claim of the plaintiff about illegal activities under the alleged combinations or conspiracy is that there was activity to shut off the plaintiff's source of news. Peterman specifically testified that he was refused statements regarding certain matters by Botwinick, by Alfred Marks, by Schaffran, by an attorney for Metropolitan and by another attorney for certain taxi owners.

Peterman also testified that his previous invitation to attend Metropolitan meetings in the spring or summer of 1964, and that he was denied entry to a UTOG meeting in 1965 or early 1966.

Defendants contend that if these events occurred, they were sporadic, independent actions, the natural independent actions resulting from the anger or antipathy felt toward Peterman rather than being the product of any common scheme, any combination or conspiracy.

Also, defendants contend that Peterman, when he attended the meetings of Metropolitan, did so not to gather news but to obtain assistance in getting subscripions.

The final claim of the plaintiff as to illegal activities manifesting the alleged combination or conspiracy is that there was activity to shut off the plaintiff's source of advertising.

Plaintiff claims that this activity took two forms: pressure from defendants who were customers of advertisers to get these advertisers to withdraw from Taxi Weekly, and also the spreading of false rumors that Taxi Weekly was backed by the controversial owner of Checker Cabs, Morris Markin.

Plaintiff contends that the evidence showed that Chrysler Corporation cancelled its ads after receiving the Marken rumor from the New York field man, Sailler, and that Sailler had spoken to Maren and other fleet owners.

The plaintiff contends that both Chrysler and Future Motors, a large dealer in fleet taxis, canceled their advertising under circumstances where it was uneconomical for them to do so when viewed from the normal standpoint of advertising rates and costs thus indicating some external pressure or other unusual reason

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for the cancellations.

Plaintiff contends that Rockwell, a maker of taxi meters, cancelled its advertising in Taxi Weekly after 11 co-witnesses had asked Moore of Rockwell why Rockwell was still advertising in Taxi Weekly because it was no longer the fleet's paper.

Plaintiff contends that Botwinick admitted spreading the Marken rumor in 1965.

Plaintiff further points to a pattern of advertising cuts and cancellations shown by the statistics.

Defendants have a number of contentions in response. They contend that the cut in advertising was the result, the natural result of the drastic reduction in Taxi Weekly's circulation and was not the result of any pressure or rumors for which defendants were responsible.

Defendants point to the denials in all of the depositions of the defendants which were read, the denials that they had any discussions with advertisers designed to have them cut their advertising in Taxi Weekly.

Defendants also point to the testimony by Sailler, by Ulrich and Moore that these men regarded any comments to them about Peterman or Taxi Weekly as casual conversations and that they were not influenced by them to do anything about the advertising of their companies

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in Taxi Weekly.

I instruct you that in an actual illegal conspiracy, acts and conversations aren't as open and obvious as in normal business transactions. There is usually subterfuge and the transactions and communications are usually veiled in one way or another.

The question for you to determine on this point is, has the plaintiff proved by a fair amount of the evidence that there were communications by defendants or some of them with advertisers designed to make these advertisers cancel from Taxi Weekly even though the evidence of such communications is not completely explicit, or was this a situation, as defendants contend, where there were at most sporadic independent conversations which were indeed nothing more than casual comments?

I should say a word, at this point, about what we have been calling the owner-driver defendants, that is, the two trade associations, ITOC and UTOG, and the defendants Alfred Marks, the president of ITOC, and the defendant, Salvatore Baron, who was Executive Director of UTOG, and Chairman of the Board of ITOC.

In other words, Baron was principal in both ITO and UTOG. ITOC and UTOG have sought to be connected with the alleged conspiracy basically through the acts

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of Alfred Marks and Baron.

Although there is the evidence, I mentioned a moment ago, of Peterman's testimony that he was denied entry into a UTOG meeting there is no identification of what person did that.

But aside from that, these two associations are really thought to be connected with the conspiracy, the alleged conspiracy through the acts of Alfred Marks and Salvatore Baron.

So, basically, you must consider whether the evidence as to Alfred Marks and Salvatore Baron is sufficient to implicate these individuals and through them their trade associations.

Now, Baron and Alfred Marks were present at an ITOC meeting on July 13th with the defendants McIntyre and Botwinick, but there is no direct evidence that there was any discussion at this meeting among these persons of any actions to be taken against Taxi Weekly.

In fact, there is no evidence that Baron or Alfred Marks, or ITOC, or UTOG, took any action against Taxi Weekly in the way of cancelling subscriptions or otherwise as a result of this meeting, or immediately following it.

The plaintiff contends, however, that Alfred

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Marks refused an interview with Peterman in the fall of 1964 and contends that Baron spread the Marken rumor about Peterman in 1965.

On the other hand, Alfred Marks and Baron contend that these acts were nothing but personal independent acts unconnected with any combination or conspiracy.

Indeed, Baron contends that he was merely personally retaliating for an attack Peterman had made on him.

You must determine whether the plaintiff has proved by a fair preponderance of the evidence that these owner-driver defendants, or any of them, were parties to a combination or conspiracy rather than that there were certain personal individual acts by Alfred Marks and Baron which would not involve these defendants in a conspiracy.

Now, if you find that any of the defendants were members of a combination or conspiracy, to do any of the illegal acts I have defined, then two questions still remain: first, has the plaintiff proved that such conspiracy caused injury to the plaintiff? And next, if so, what is the amount of damages the plaintiff has proved?

Incidentally, the fact that I instruct you on these questions shouldn't be taken as indicating any view of mine that plaintiff has prevailed on the first two questions relating to the existence of the conspiracy or membership therein, but if you answer questions 1 and 2 yes, in any degree, then you must go on to the next questions, and, of course, you will want to have my instructions on those further questions.

With regard to the question of proof of injury, I instruct you as follows: you must determine whether the plaintiff has proved by a preponderance of the evidence that it has suffered actual economic injury as a direct and proximate result of the defendant's violation of the antitrust laws.

An injury or damage is proximately caused by an act whenever it appears from the evidence that the act played a substantial part in bringing about the injury or damage; that the injury or damage was a direct result or reasonable probable consequence of the act.

But, on the other hand, if a particular injury was caused by reasons other than the defendant's illegal conduct, then the plaintiff cannot recover.

In this regard, you have heard various arguments about caution which I won't attempt to repeat to you. For instance, you heard the defense's argument that any withdrawal or cancellation of advertising was the result,

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not of any conspiratorial acts of the defendants, but was the result, the inevitable result of the fact that subscriptions of the paper were down.

Now let me read to you the third question which will be in your interrogatory form. If your answer to questions numbers 1 and 2 were yes, do you find that plaintiff has sustained its burden of proving by a fair preponderance of the evidence that it suffered actual economic injury as a direct and proximate consequence of such combination or conspiracy?

Now, on the question of the amount of damages, in this regard the question for you is, if you reach it: What was the value of Taxi Weekly, Inc., prior to the time of the alleged conspiracy? That would be in the spring of 1964.

Basically, the plaintiff contends that this corporation was in a state of health at that time, that its business was as good in all respects or even a little better than it had been in the prior few years, and that the conspiracy hit this healthy business and destroyed it.

Of course, the defendants deny that there was a conspiracy. But on the question of damages, they contend that if you find that there was illegal activity going

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beyond the rights of the defendants, then the defendants contend that this illegal activity didn't hit a healthy corporation; it hit a sick corporation. That, despite the statements and figures in the financial statements, for instance, of March 31, 1964.

There were factors which indicated the seeds, at least, of weakness and sickness, and that in evaluating this corporation you must evaluate it in that way in connection with damages.

Now, in support of their contention, the plaintiffs rely on all the evidence that they have adduced about the strength and health of the corporation in the spring of 1964, and the plaintiff has also called Mr. Kobak as an expert witness to testify in their favor.

The defendants rely on all the evidence about what they contend with the circumstances of the paper prior to the alleged conspiracy, and they have called as an expert witness Mr. Harnet.

I instruct you that you should consider the opinions of such expert witnesses but that you are in no sense bound by either of their opinions.

You may give such testimony as much or as little weight as you believe it deserves. The ultimate question regarding the proper amount of damages, if any,

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is for you as the jury to determine with your good judgment and common sense.

In connection with evaluating the opinions of experts, you should determine whether you believe that the factual assumptions underlying these opinions were accurate and complete, and this will be an element in evaluating the opinions given to you, and estimates of value.

Now Mr. Kobak testified that in his opinion the going concern value of Taxi Weekly, Inc., as of the spring of 1964, was about $250,000. You have heard the contentions of the two sides as to the validity or invalidity of his methods of calculations and I will not repeat them.

It is for you to determine the validity or invalidity of his calculations and his estimate.

As to Mr. Kobak's factual assumptions, you have also heard Mr. Kobak testify that in arriving at his figure of $250,000 he didn't take into consideration anything about a possible dispute between Peterman and Weisinger, or about a possible dispute between Peterman and the fleet-owner subscribers, nor did he take into account anything about any problem regarding the publication of two titles, Taxi Weekly and Taxi Age.

Indeed, that matter came up at the very end of his testimony on Friday, and, basically, there was no question asked of him about that subject. It was not developed in his testimony.

However, Mr. Kobak did testify that although he might not give much weight to a dispute between Weisinger and Peterman if Weisinger was inactive, he would consider it necessary to find out the facts regarding any dispute between Peterman and the fleet owners, and this could effect his evaluation depending upon the facts he found.

It is for you to determine the facts as to whether or not there was, indeed, a dispute between the two owners of Taxi Weekly, Peterman and Weisinger, in the spring of 1964, and the nature or seriousness of that dispute.

It is further for you to determine whether or not there was a dispute or a disagreement, or antagonism between Peterman and the fleet-owner subscribers in the spring of 1964 before the alleged conspiracy, and it is for you to determine the effect on the value of the paper, if any, of either of these circumstances.

It is for you to determine whether there is any problem about the two names, Taxi Age and Taxi Weekly which should be considered in evaluating the plaintiff corporation.

If you decide that any or all of the circumstances existed, or these problems existed, whatever way you determine them, and if you determine that any of them affected the value of the corporation, then you must determine how this affects Mr. Kobak's opinion and his evaluation because he didn't take any of these circumstances into account.

In summary, after looking at all of the evidence, you may accept Mr. Kobak's opinion and evaluation or you may reject it entirely, or you may give it whatever weight you determine it should be given including making some adjustment to his figure in whatever degree you wish or in whatever degree you feel should be done.

The defendant's expert, Mr. Harnet, testified first that he estimated the value of Taxi Weekly, Inc., on the basis of the financial statements and the information he had been given about the company, and he testified first assuming the absence of any of the three problems that I told you about as being issues.

Mr. Harnet testified and he explained his method of calculation. He testified that he would value, under those circumstances, the business of Taxi Weekly

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in the spring of 1964, as no more than about $12,000.

Again, you have heard the contentions of the parties about Mr. Harnet's method of approach and the validity or invalidity of that, but I won't summarize again those contentions.

Mr. Harnet next testified as to his estimate of the value of Taxi Weekly, Inc., taking into account the three factors which were given to him by the defendants, that is, the assumption that there was a dispute between Peterman and Weisinger, that there was a dispute between Peterman and the fleet-owner subscribers, and that there was this problem about Taxi Weekly-Taxi Age.

Mr. Harnet testified that the Peterman-Wysinger dispute, if it existed, would affect the value of the paper if it related to the policy of the paper.

Mr. Harnet testified that the dispute between the fleet owners and Peterman, if it was occurring, would affect the ability of Taxi Weekly, Inc., to continue its business or its level of business and would affect seriously the value of the company.

Mr. Harnet testified that the matter about Taxi Weekly and Taxi Age involved possible fraud on the Post Office, possible increases in mailing costs, and possible damage to the reputation of Taxi Weekly, Inc.

with advertisers and subscribers.

Mr. Harnet testified that taking all these factors into account, would lead to an estimated value of Taxi Weekly, Inc., in the spring of 1964, as nominal or negative.

Again, it is up to you to decide how much to use or credit the testimony of Mr. Harnet the same as it was with respect to the testimony of Mr. Kobak. You can reject Mr. Harnet's testimony, you can accept it, or you can make some evaluation based upon it as you see fit in your good judgment.

Now, in the course of your fact-finding, as I mentioned, you will resolve questions about credibility, the accuracy of the testimony of the witnesses. I mentioned, at the beginning of the trial, factors you will take into account and let me go over them briefly again with you now.

In the present case, we are dealing with events which occurred 10 years or more ago. The fact witnesses testified as to their version of the events and transactions. Most of these were presented to you by way of depositions.

Mr. Peterman, however, testified before you in court. All the other fact witnesses testified through depositions. But you will need to assess the credibility

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both of Mr. Peterman and the deposition witnesses.

As I stated to you at the beginning of the trial, the starting point for judging credibility is your ability to observe the witness and whether he appears to be candid and straightforward or whether he appears to be otherwise. You have had the opportunity to observe the demeanor of Mr. Peterman. You have not had the opportunity to observe the demeanor of the deposition witnesses.

But there are a number of other factors to consider in judging credibility, and these other factors apply equally to live witnesses and deposition witnesses.

My point is that although you didn't hear the deposition witnesses in person and observe them, you are still obliged and you are able to determine their credibility.

You will consider whether the answers were direct or evasive. You will consider whether there was any hedging or any attempts to avoid direct answers.

You will consider how likely or probable or how unlikely or improbable a witness' version is.

You will consider whether a witness told innocent stories. Did he testify one way at one point and then change and testify another way later on.

Did he testify in a way which was inconsistent with some prior statement?

Is there any proof of falsification either in court or on a prior occasion?

If so, if there is any such circumstance as inconsistencies or proven falsifications, how important were these circumstances?

Does it cast doubt on the basic points of a witness' testimony or are there points in the witness' testimony, either in whole or in part, in court that you find reliable?

An important question to be considered in the present case is the accuracy of memory of events. Even the depositions, which were taken closer to the events than the present trial, were taken mainly in 1969, some five years after the main happenings.

So the question is, does the witness have an accurate memory of what he is testifying about?

Getting back to the question of honesty as distinct from accurate memory, you will want to consider whether a witness who has testified as to lack of memory is honest in this regard or whether he is fabricating loss of memory.

Another factor to considered on the issue of credibility is whether the witness is coloring his testimony

emb 45

because of a bias or prejudice or interest in the case.

Both Mr. Peterman and the defendants have obvious interests in the outcome of the case. This doesn't mean that they are incapable of testifying truthfully. And it is for you to determine, on the basis of this and other factors, how accurate and credibile their testimony is.

This is basically the conclusion of my charge. I wish to say to you, in general, that when you retire to the jury room you should discuss the case among yourselves thoroughly, listen to each other, consider each other's views, and this is the democratic jury process.

I neglected to read the final question on the verdict form which is as follows: If your answer to question No. 3 is yes, state the amount of damages, if any, you find the plaintiff has sustained.

Now, your answer to each question must be unanimous. What that means is the unanimous conviction of each one of you. Now, if you come to the point in your deliberations where you cannot remember some evidence, or you cannot remember a portion of the charge, and you feel that you have to have it, you need it to continue, then, under those circumstances, you request a reading of the minutes on the specific point you are interested in.

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But I wish to tell you that that process is somewhat lengthy and can interfere with the deliberations because the reporter has to find on his tape the reference you are talking about. So I ask you to do this before you request a reading of any portion of the record: try to trade your recollections. Sometimes one person can't remember something and another person can, so trade your recollections and see what you can do before you ask for a reading of any portion of the record.

You are entitled to have, in the jury room, any or all of the exhibits. I think we wouldn't send them all in at the beginning. The best way I do it, as I have found, is to wait for the jury to request what they need at the time that they need it. They are all available and you just request what you want.

Juror No. 1 will be the forelady unless she declines to act, and then you will elect one of your other members as your foreman or forelady.

There will be a marshal or marshals outside the door of the jury room, and any messages you have, or any requests for assistance of any kind, or for information should be made by your forelady in a note given to the marshals directed to the court, and I will then take whatever action is appropriate.

Now, when you have reached a verdict which, as I said, must be a unanimous verdict, the unanimous verdict of each one of you with respect to the answers to each one of these questions, when you have reached a verdict, please send out a note saying that you have reached a verdict. The verdict should be announced in open court. It shouldn't be contained in the note. Just tell me that you have reached a verdict and it will be rendered in open court.

If you would hold your places for just a minute, I want to see if any of the lawyers have any corrections or additions which should be made to the charge, and I will see them in the robing room briefly.

(In the robing room.)

THE COURT: Mr. Wentzel.

MR. WENTZEL: Your Honor, I except to the charge insofar as the court has refused to grant my request Nos. 7, 11 and 12, which relate to the matter of per se violations.

THE COURT: You have your record on that fully.

MR. WENTZEL: No. 19, I would request you to charge the jury that it was not necessary for the plaintiff to prove the precise amount of damages with any mechanical certitude.

THE COURT: Yes, I'm sorry. That was an oversight. All right.

MR. WENTZEL: And I except to the court's refusal to charge request No. 24 which related to inflation.

THE COURT: All right.

MR. NESSEN: Your Honor, I respectfully except to your failure to charge the jurisdiction section, charges 19 through 27.

THE COURT: Just one second. On that I want to have further proceedings which I will schedule, not immediately, but at some point when we are together, perhaps later in the day, or even tomorrow. As I said on the record, to try to expedite the trial, and to eliminate what I consider to be unnecessary evidence, I believe that from the proof in the record and from the offers of proof, it is clear, as a matter of law, that there is a sufficient nexus with interstate commerce. You have your record, Mr. Nessen, and I want all sides to complete their record on that point. Okay, that's all need be said.

MR. NESSEN: I respectfully except to your failure to charge requests 45 and 46. Shall I wait for you, your

Honor?

THE COURT: No, I'm with you.

MR. NESSEN: 45, 46, 48, 49, 50, 51 52, and 53.

THE COURT: Well, I will deny those requests to the extent they are not covered by what I said in the charge and to some extent they are covered by what I said in the charge.

MR. NESSEN: Your Honor--

THE COURT: But there is a distinction.

MR. NESSEN: Oh, yes, sure.

THE COURT: Anything else?

MR. NESSEN: Yes. I see a distinction between your charge on proximate cause and our request 73.

THE COURT: Yes. I resolved to use, basically, Judge Weinfeld's charge. There is a distinction and I have resolved it in the way I did.

MR. NESSEN: Just for the record, it is "but for 73,"in 73, definition of approximate cause.

Your Honor, let me except in general. I don't think there was sufficient evidence of a nexus between Wysinger and this defendant here to submit it to the jury.

THE COURT: You have your exception.

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MR. NESSEN: And similarly, I don't think there was either nexus or, indeed, it was so de minimis that they could look to the refusals to give news, and I think, your Honor, that--

THE COURT: Okay, I have your exception.

MR. NESSEN: And I would like to also, concerning the coercion and subscriptions, I just think that there was sufficient--what I am trying--

THE COURT: You have made your point. You would object to charges on the first three elements of the conspiracy I charged.

MR. NESSEN: And in particular this, which is the very key, that I don't think, as your Honor charged, you would find that if you found one of these, that was sufficient. I think surely one and two are insufficient by themselves.

THE COURT: All right, I have got your point.

Anything that you have Mr. McGrath?

MR. MC GRATH: I join in the exceptions of Mr. Nessen.

THE COURT: Fine. Let's go back.

MR. NESSEN: Thank you very much, your Honor.

(In the courtroom.)

THE COURT: There is only one point that I

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think should be clarified. Give me a second to think about that.

On the question of damages, I think it is implicit from what I said but I want to make it explicit. The plaintiff has the burden of proving the amount of damages. You cannot find any more damages than you find the plaintiff has proved by a fair preponderance of the evidence. But that doesn't mean, obviously, that the plaintiff has to prove something calculated with mathematical certainty. That would be an impossibility in a circumstance like this, and it is obviously not required.

Even the type of estimation in the normal business that we are talking about isn't proved with mathematical certainty so that's not required. It is simply a matter of seeing whether the plaintiff has proved an amount of damage to be reasonably estimated based on some sound logical basis. That's what is required.

All right, I am at the point where I have to dismiss alternate No. 1. You have been our insurance policy against the complete failure of the trial because if we only had 6 jurors and one of them had been incapacitated for some reason, in the middle of the trial, we couldn't have continued with 5 or 4, but at this point

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only the 6 jurors can deliberate and reach a verdict, so alternate No. 1, you have our deep thanks for your hard work and attention to the case.

As to the rest of the jurors, I think we need to administer the marshal's oath and then retire.

(A marshal was duly sworn.)

(The jury retired. Time noted: 11:23 a. m.)

(Defendant's Exhibits BN & BO marked for identification.)

arjb 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

TAXI WEEKLY, INC., et ano, :

Plaintiffs, :

-v- : 66 CIV 2827

METROPOLITAN TAXICAB BOARD OF TRADE, INC., et al., :

---x

July 16, 1975
2:30 p.m.

BEFORE:

HON. THOMAS P. GRIESA,

District Judge.

A P P E A R A N C E S:

NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SULL, ESQS.
Attorneys for defendant Metropolitan,
BY: MAURICE NESSEN, ESQ.
-and-
MORTON J. TURCHIN, ESQ.,
Of Counsel

CHRISTOPHER C. McGRATH, JR., ESQ.
Attorney for defendant Independent Taxicab Owners

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(The following took place at 2:50 p.m., jury present.)

THE CLERK: Ladies and gentlemen, have you agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: Stand up and read the questions and the answers.

THE FOREMAN: On question one, do you find that plaintiff Taxi Weekly, Inc. has established by a fair preponderance of the evidence that there was a conspiracy or combination during the time in question against the newspaper Taxi Weekly in unreasonable restraint of trade as defined in the Court's charge: We find yes.

Our answer to number 1B question, do you find that the plaintiff has established by a fair preponderance of the evidence that any of the following defendants knowingly entered into such conspiracy or combination: The answers are with respect to Metropolitan Taxicab Board of Trade, Inc.,yes;

Independent Taxicab Owners Council, Inc., no;

United Taxi Owners Guild, Inc., no;

Hosynd Publications, Inc., yes;

Jack Plotsky, yes;

Morris Heit, yes;

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Benjamin Botwinick, yes;

Salvatore Baron, no;

Alfred J. Marks, no;

George MacIntyre, yes;

Alfred Zeff, yes;

Morris Lefkowitz, yes;

Milton Marks, yes;

Leon Murstein, yes;

Gerald Naren, yes;

Ira Suchman, yes;

Leonard Schaffran, yes.

If your answers to questions 1 and 2 were yes, do you find that the plaintiff has sustained its burden by a fair preponderance of the evidence that it suffered actual economic injury as a direct and proximate consequence of such combination or conspiracy? We find yes.

The amount of damages that we find for plaintiff has sustained was determined by us as $225,000.

THE COURT: All right. Do you wish the jury polled?

MR. NESSEN: No need, your Honor.

THE COURT: Ladies and gentlemen, thank you very much for your services and the attorneys and parties all thank you very much and you are now excused.

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(Jurors excused.)

MR. WENS: We move for judgment in the amount of $225,000 times three which I believe is $675,000 against the defendants with respect to whom question 2 was answered yes.

THE COURT: What do we do about attorneys' fees?

MR. WENS: Secondly, we move to hold a hearing on the question of attorneys' fees. As I read the Grennell case in the Second Circuit last year, I think a hearing is required unless the defendant will perhaps stipulate as to the amount of fees.

I would like an opportunity to get my own records together so I can present them in a form as the Court in the Grennell case suggested be done in such matters. That is to say, partners' time, associates' time and that sort of thing. I do need to spend a day or two examining our records.

THE COURT: In an affidavit, I take it?

MR. WENS: Yes. The problem is that the Grennell case is, as I read it, it does require a hearing.

THE COURT: But in the Grennell case it relates to a class action and it is very rare that anybody requires live testimony. All you need is an affidavit with facts set forth and if there is any challenge to it, maybe there has to be some examination or cross examination.

MR. WENS: I am prepared to proceed on that basis.

THE COURT: You proceed on that basis and show it to Mr. Nessen and see what is required and if there is any reason to have a hearing, we will have a hearing and if there isn't, we won't.

You can file that affidavit when? Show it to Mr. Nessen when?

MR. WENS: I probably will have it by Monday I would think, your Honor.

THE COURT: All right.

You prepare a form of judgment.

MR. WENS: Do you want me to do that?

THE COURT: Yes.

MR. NESSEN: May we make motions at this time?

THE COURT: Sure.

MR. NESSEN: I move respectfully to set aside the verdict as against the weight of the evidence and I also move for a new trial and also move for judgment n.o.v.

I think that the damages here are very grossly excessive and against the weight of the evidence and I do think that we are certainly entitled to a new trial on that element.

I do think as to liability we are entitled to a new trial on that too.

I do think the verdict here is highly excessive and it is completely shocking to me and there is no real basis on this record.

THE COURT: Well, do you say that you could have a new trial solely on damages?

MR. NESSEN: Yes, I think I would be entitled to that, your Honor.

THE COURT: Frankly, that is the only question that I think is really serious in my mind. I think the verdict is amply justified on the questions of liability and I think that the jury obviously made a fair delineation of the situation of the defendants.

But I must say on the issue of damages I think there could well be merit to a new trial on damages because the only evidence in support of anything approaching $225,000 was Mr. Kobak and Mr. Kobak admittedly did not take into account a state of facts which is almost conclusively presented by the verdict. If the verdict indicated enough animosity against Peterman to engage in a conspiracy, there must have been enough animosity to weaken this company.

MR. WENS: I'm afraid that baffles me frankly, your Honor.

THE COURT: It doesn't baffle me a bit. Your theory to the jury was that the conspiracy swung full bloom suddenly in July when Botwinick couldn't get capital and that is preposterous to me. It is against the weight of any rational explanation of the evidence.

I think the weight of the evidence could very well be found that there was animosity leading the defendants to go beyond what their legal rights were and the jury was amply entitled and if I were on the jury I would have found the same thing. I would have voted for exactly the same verdict they came in with.

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But as far the damages, we have all given the facts an intense amount of consideration and I would like to think it is worthwhile to submit a formal motion on all the grounds that you are suggesting. But I would think that the one that I would regard as the most serious problem is the matter of damages and it appears to me that the jury took Mr. Kobak's testimony with a slight discount, almost negligible discount and if the Court is entitled to grant a new trial as contrary to the weight of the evidence, I will seriously consider doing just that.

MR. NESSEN: Thank you, your Honor. I will confine the motion to the issue of damages.

THE COURT: I think that there is a question about the fairness or unfairness of this verdict and it may well deserve not to stand but you brief the situation as to the power of the Court, the circumstances which would justify a partial new trial and when can you have this? Timing is very difficult here but--

MR. NESSEN: Well, I will try to get it in by Monday.

THE COURT: That is fine.

You know the problem. If you could get to work on the questions that Mr. Nessen is going to work on, namely, the power and the circumstances for the Court to grant a partial new trial on damages, under what circumstances that can be done and maybe you could have your reply by Wednesday.

MR. McGRATH: I will join in that motion made by Mr. Nessen on behalf of the defendant Hosynd and Alfred Zeff individually and only those defendants.

THE COURT: All right.

I will deny all motions except reserving decision on the motion for either a new trial separately on damages or a new trial on the whole case, if the damage issue cannot be tried separately. Maybe it can be done.

MR. NESSEN: Thank you, your Honor.

(End of verdict.)

eolm 1

TAXI WEEKLY, INC., et ano

vs.

66 Civ. 2827

METROPOLITAN TAXICAB BOARD
OF TRADE, INC., et al.

July 31, 1975
New York, New York
11:30 a.m.

(Trial resumed.)

THE COURT: Let's list the things we need to do today.

We need to take up the defense's motion for a new trial or a mediator.

We need to cover the matters about the Interstate Commerce point that we left open.

I would like to put a short statement on the record as to the basis of my reason in preparing the charge as I did on the Anti-Trust points.

We have the attorney's fee application and I guess that is about all.

One point that may be simply a matter of preparing a judgment in the event I don't grant a new trial, which I don't think I will, but the judgment, I assume, will be for the amount permissible under the Anti-Trust laws on Count 1 in the amount permissible under the Donnelly Act on Count 2.

I think we had better keep that in mind because the way that the case was submitted to the jury was that

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the same factual considerations would apply to both the Donnelly Act and the Federal Anti-Trust matter.

Now, they have found liability here, which under the instruction and under our agreement would lead to either Sherman Act liability or the Donnelly Act liability. Of course the big difference is the lack of trebling under the Donnelly Act. I assume that there is no provision for attorney's fees under the Donnelly Act, but that is something that we will have to keep in mind and handle in an appropriate way.

Let's start, perhaps it would be more orderly to start with the Interstate Commerce. That relates to completing the record, and I think we ought to complete the record before we get into post trial motions.

MR. WENTZEL: Your Honor, I have asked Mr. Pratt to gather up all the materials on that and take care of that matter.

MR. PRATT: Your Honor, the certain defendants have submitted a stipulation to us which I think might materially shorten the time that it will take today. It deals with the advertising that has been -- we have already talked about in the previous sessions, and I would like to just have it marked as an exhibit now.

xxx (Plaintiffs' Exhibit 115 marked for

identification.)

MR. PRATT: Your Honor, I propose to ask Mr. Peterman now to take the stand and we can ask him the necessary questions.

THE COURT: Let the record show, so there is no obscurity on this point, during the course of the trial and before the trial we had all discussed ways of simplifying the handling of the issue of interstate commerce effect which underlies the jurisdiction of the Sherman Act claim.

The plaintiff proposed in its requests to charge that the jury be told as a matter of law that there was sufficient interstate commerce effect.

The defense asked to have the charge on that point and have it submitted to the jury or have a ruling that as a matter of law there was no sufficient interstate commerce effect.

Now, during the course of the trial on the basis of going back and forth between looking at the case law and seeing what the proof was or the offers of proof, it became apparent to me that there was as a matter of law sufficient interstate commerce effect to sustain Section 1 of the Sherman Act jurisdiction.

What I told the attorneys I would do would be to allow them to complete their record on this point out of

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the presence of the jury because I was so sure that it would not be a jury issue, and that is what we are doing now.

Okay.

You are still under oath, Mr. Peterman.

SEYMOUR PETERMAN, recalled as a witness by the plaintiffs, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. PRATT:

Q In the course of publishing Taxi Weekly and when I say Taxi Weekly I also include, of course, that portion of the circulation that went under the name of Taxi Age, did you publish news articles obtained in interstate courses, in other words, from other states?

A Yes, I did.

Q Would you tell us how you physically obtained those stories.

A There were several means. One was clippings were sent to us from various sources that were in the business of clipping out newspapers from all over the country and some international newspapers.

Q Were these clippings, did you obtain them from clipping services or individuals who made that their business?

A I believe most were individuals. One or two may have been services in that more than one individual would have been involved.

Q Were these individuals or services themselves located outside the State of New York?

A Yes, all of them were.

Q Would you take a look at the documents I have handed you and can you identify those documents?

A Yes, sir. These are clippings that I did receive from clipping people and sources that I just was talking about.

Q In other words, those were received at least in substantial part from clipping services or individuals who were located outside the State of New York.

A Yes, I think every one of them was from outside the state.

Q Did these individuals look at newspapers or other publications that were published or located outside the State of New York?

A Yes.

MR. PRATT: I would like to have this set of documents marked. I would propose they be marked as a single exhibit, your Honor.

THE COURT: All right, can we do that.

xxx (Plaintiffs' Exhibit 116 marked for identification.)

MR. PRATT: Your Honor, can we offer them at this time.

THE COURT: Any objection?

MR. TURCHIN: Yes. We have no period of time. He hasn't identified any sources.

Number three, there are vague conclusory statements here that they came from out of the state.

THE COURT: Received.

xxx (Plaintiffs' Exhibit 116 for identification received in evidence.)

MR. TURCHIN: Are we going to see them, Mr. Pratt?

MR. PRATT: Yes.

Q Mr. Peterman, do you recall how many states or at least how many states of the United States articles appeared in originally that later appeared in Taxi Weekly?

MR. TURCHIN: Could I have that question read back, please, your Honor.

THE COURT: Yes, let's read it back.

(Question read.)

A The vast majority of them. I would say practically all of the states sooner or later provided articles that were in Taxi Weekly.

Q Did articles also originally appear in foreign countries that were later published in Taxi Weekly?

A Yes.

Q Do you recall any particular countries?

A Yes, particularly England and Canada, but also there were articles from some of the Continental European countries that I can recall.

Q Did you also obtain news articles for Taxi Weekly from other journals in the United States such as Automotive News?

A Yes, and other trade publications covering the automotive area.

THE COURT: Can I have the last question and answer read, please.

(Record read.)

Q These articles were obtained directly by you as opposed to the clipping services?

A That's right. I got Automotive News and several other publications, McGraw Hill publications in that area.

Q Do you recall where Automotive News is published?

A In Detroit.

Q Did articles that originally appeared in your newspaper later appear in newspapers outside the State of New York?

A Yes.

THE COURT: Before we go any farther, shouldn't this 115, the stipulation, be in evidence?

Also there is a yellow -- there is a handwritten note which is attached to the second page. Is that part of the stipulation?

MR. PRATT: Your Honor, I propose to get to this stipulation in due course. I will get to it in a minute.

THE COURT: Okay. Let's go kind of quickly over the news. I think we can get the point without spending too long.

Q Mr. Peterman, I give you now a series of documents, a number of which have been previously marked for identification, and I ask you are those examples of magazines or publications outside the State of New York in which Taxi Weekly articles were reprinted?

A Yes. Articles or news items were picked up from Taxi Weekly and appeared in these publications.

MR. PRATT: Your Honor, all of the articles that were the subject of the last question had been premarked during the course of the trial with the exception of certain Automotive News articles, and I would suggest we make them an exhibit called 18-A. 18 is one Automotive News and if we make this 18-A, that will pick all the rest of them.

xxx (Plaintiffs' Exhibit 18-A marked for identification.)

Q Mr. Peterman, could you just quickly identify what exhibits you have there by number and name the publications and the location of the publication.

THE COURT: Doesn't it say?

A Automotive News doesn't say on it, but it was published in Detroit as I said before.

Q I think it does say in most of the cases.

A In the other cases, these are English publications and it is evident from the publications.

MR. PRATT: I would like to offer at this time Exhibits 18, 18-A, 19, 20, 21 and 22 in evidence.

THE COURT: Is there objection?

MR. TURCHIN: I would like to see them, your Honor.

THE COURT: Sure.

MR. TURCHIN: May I ask one question, your Honor?

THE COURT: Sure.

VOIR DIRE EXAMINATION

BY MR. TURCHIN:

Q I gather these are foreign journals which have taken an article from Taxi Weekly and published it in a foreign journal; is that right?

A That's right

MR. TURCHIN: We would object to these. They are irrelevant and nothing to do with commerce.

THE COURT: Overruled.

18, 18-A, 19 and 20, 21 and 22 are received.

xxx (Plaintiffs' Exhibits 18, 18-A, 19, 20, 21 and 22 for identification received in evidence.)

BY MR. PRATT:

Q In the course of your time of running and publishing Taxi Weekly, did radio and television stations and other publications contact you from time to time?

A Yes, they did.

Q Did they also seek to explore or to seek background on the taxi industry?

A Yes.

Q Can you identify some of these entities that contacted you?

MR. TURCHIN: I would object to this line of questioning, your Honor. Nothing to do with the interstate commerce of the paper.

THE COURT: Overruled.

A All the major newspapers then publishing in New York, the daily newspapers from time to time would contact us for background on issues that were affecting the taxicab industry and that were of sufficient interest to the general public to be published in those newspapers.

In addition, a number of the local radio and T.V. stations contacted us. Time Magazine, Newsweek, Look and Life, which were then being published.

MR. PRATT: Your Honor, I would next offer --

A (Continuing) Fortune.

MR. PRATT: -- next offer in evidence an exhibit premarked as Exhibit 51 for identification which is a summary of certain issues in 1966 of Taxi Weekly in 1966 showing the source and the type of news published.

THE COURT: Any objection?

MR. TURCHIN: Yes, there is, your Honor. I believe these publications are already in evidence, and I think Mr. Peterman's summary of them is irrelevant.

THE COURT: I overrule that objection.

MR. TURCHIN: This is also 1966, your Honor. It is a summary of articles that appeared in the year 1966. I don't think that is relevant to the issues here either.

Q Mr. Peterman, is there anything different about the type of news articles in terms of their source and their character in 1966 from 1964?

MR. TURCHIN: I object to that.

THE COURT: It isn't that important. I will sustain the objection.

Q Did Taxi Weekly circulate in interstate commerce, that is, did you send it to subscribers or persons outside the State of New York?

A Yes, I did.

Q Can you give us some idea, for example, the last issue, how many people outside the State of New York received it?

A I believe --

MR. TURCHIN: We are talking about 1964 I believe, your Honor.

THE COURT: Let's stick back at the time.

A The number was approximately the same give or take some through the years.

Q What was that number?

A Around 120 or so.

MR. TURCHIN: I couldn't hear that. 120?

THE WITNESS: Around there. Somewhere around there. Over a hundred anyway.

Q To what type or categories of persons was this newspaper sent?

A A lot of them were advertisers, potential advertisers, advertising agencies that were customers, potential advertising agencies for potential customers and cab industry people in other parts of the country.

MR. PRATT: Your Honor, now I would offer in evidence the stipulation that has been prepared by the defendants heretofore.

The yellow sheet that you mentioned earlier is my note and I think we will take that back.

THE COURT: All right. I will receive 115.

MR. PRATT: Your Honor, at the top part of it I have made some interlineation.

MR. NESSEN: We have a clean copy here. Why don't we offer a clean copy.

MR. PRATT: I propose it in the form I have interlineated it.

THE COURT: Show it to defense lawyers.

MR. TURCHIN: I prepared the stipulation and I haven't seen a copy of this.

THE COURT: You will see it right now.

MR. TURCHIN: Thank you, your Honor.

Your Honor, we would object to Exhibit 115 insofar as the first paragraph has been varied from what we proposed as a stipulation.

THE COURT: Okay, let's see it.

Let's just have it as originally worded. It is not going to influence the issue to have the caption of the stipulation varied a little bit in this way. Let's take it as originally worded.

xxx (Plaintiffs' Exhibit 115 for identification received in evidence.)

THE COURT: I think the record ought to show that by the wording of the initial paragraph of that stipulation nobody is conceding anything about whether this was in effect one newspaper or there were indeed two papers. It is simply a way to get into the subject of advertising.

Isn't that right?

MR. PRATT: That's right, your Honor.

THE COURT: It isn't received on that subject. It is simply received on the Interstate Commerce point.

All right.

Q Mr. Peterman, the stipulation, which has been marked 115, lists a number of advertisers in Taxi Weekly; is that correct?

A Yes, it does.

Q It lists the advertising agency and the address of that advertising agency for each of those advertisers?

A In a case where there is an agency.

Q Yes. Now, in some cases were there different addresses for the purpose of billing an advertisement and the place in which the advertisement was originally placed?

A Yes.

Q Can you look at category Number 1 on Plaintiffs' Exhibit 115 and tell us if there are any advertisers there which were listed as New York, the State of New York, which, in fact, were placed from another state?

MR. TURCHIN: Your Honor, I object to this. The invoices are here and if they are offered in evidence, fine, your Honor, they will show what they show. I think here he is explaining invoices.

THE COURT: He can testify. If he knows, he can testify.

A I believe the third item "Studebaker" where the agency is listed as D'Arcy at 430 Park Avenue, New York, New York, I believe in some cases some of these ads came from another office of D'Arcy which was located outside of New York.

I believe some of the billing may have been to D'Arcy in some other location. I believe it was the State of Missouri.

Q Would you look at the remainder of Plaintiffs' Exhibit 115 and tell us if any of those advertisers were also originally placed from locations outside the State of New York.

A Yes, Dodge on page 2, which the agency should read BBD&O & Company. The billing was to New York, New York, but the ads, all the materials for the ads came from the Detroit office of BBD&O.

Q This is still category Number 1?

A Yes.

Q Are there any of those types of situations in the other categories listed in Plaintiffs' Exhibit 115?

A I don't see any.

Q Mr. Peterman, let me ask you now about the magazine that the plaintiff corporation published. That was Taxicab Industry Auto Rental News?

A Yes, sir.

Q Did that have a circulation outside of the State of New York?

A Yes, primarily it circulated outside of New York with only about ten percent of the circulation inside the State of New York.

Q Where was that magazine printed?

A It was printed at the Dartmouth Printing Company in Hanover, New Hampshire.

MR. TURCHIN: I object to anything having to do with the monthly magazine. I think that is irrelevant. We are talking about the newspaper.

THE COURT: Isn't it true that he -- let's just assume for the moment -- well, this isn't a realistic assumption, but let's assume that the newspaper had insufficient contact with interstate commerce. I don't imagine we would be sustaining interstate commerce solely on the basis of Taxicab Industry.

When I said I thought I ruled that there were sufficient contacts in interstate commerce to sustain Section 1 of the Sherman Act, it was basically because of the advertising situation with Taxi Weekly.

I think that your elements about news gathering are of some part of the picture, but it seems to me the really weighty point is the advertising, which was to some extent placed interstate, sold interstate and which related to products clearly sold interstate, namely, potential automobiles which were sold coming from Detroit to New York.

That is really what caused me to say that I thought there was interstate commerce effect.

I don't want you to be prejudiced on your record, but I think, frankly, we are going pretty far afield when we go into the magazine.

MR. PRATT: All right, your Honor.

Q Mr. Peterman, was Taxi Weekly, the newspaper, listed in any national guide to circulation or in publication guide?

MR. TURCHIN: I object to this as being irrelevant, your Honor.

MR. PRATT: This is on the newspaper now.

THE COURT: What is the question?

Q Was Taxi Weekly, the newspaper, listed in a national publication or a guide for the publishing industry?

A Yes.

THE COURT: So?

MR. PRATT: My point is that --

THE COURT: I will sustain the objection. Let's not strain. Let's keep on the main points, please. Can't we get to the advertising?

I guess you are on the advertising now.

MR. PRATT: Your Honor, I don't believe that we need go further with Mr. Peterman. The stipulation that has been marked Plaintiffs' Exhibit 115 deals with the advertising for 1964. It is broken down into a series of categories.

For example, on the first page there is a reference to Number 1. That refers to a set of invoices that we had listed in the proposed stipulation as national advertisers located outside New York State.

THE COURT: Wait a minute, what are you talking about?

MR. PRATT: I am talking about the stipulation. which is Plaintiffs' Exhibit 115, and I want to make it clear that in the stipulation there is in summary form all of the invoices for Taxi Weekly advertising in fiscal year 1964. Category Number 1, it is broken down into categories and the categories correspond to the categories that we had set out in the proposed stipulation that was worked out before trial.

THE COURT: I don't understand what you are saying. The first page -- it says Number 1. What do you mean by Number 1?

MR. PRATT: Number 1 refers to the advertisers that we have considered national advertisers located outside New York State.

THE COURT: You mean the advertisers like Rockwell, Studebaker, Embassy Tires and so forth are entities located outside New York?

MR. PRATT: That's right.

THE COURT: Now, obviously, they maybe have an office here, but you are saying that the products are manufactured outside New York and would be shipped into New York; is that what you are saying, Mr. Peterman?

THE WITNESS: Yes.

THE COURT: On all these Category 1 items.

MR. TURCHIN: Your Honor, if I may speak, I think we are getting beyond what the stipulation is as I drafted it, and it simply says Category 1 for the very reason that we are getting away from the characterizations.

THE COURT: He can go beyond the stipulation.

MR. TURCHIN: Sure he can, your Honor, but I do want to make it clear that I don't concede to what Mr. Pratt said. Category Number 1 refers to a certain bunch of invoices stapled together labeled "1". That is all, your Honor.

THE COURT: This is a somewhat confusing document.

Now, you have got -- let's look at it. You have got three columns on the first page. One is called "Business." One is called "Agency" and one is "Amount."

Now, there is no location for the businesses except in rare instances, and I for one don't know and I don't think the record shows where Edward D. Cuffe is or most of these other people are.

MR. TURCHIN: Yes, it does, your Honor.

Q Mr. Peterman, in the cases in which you did not deal with an advertising agency, you dealt directly with the purchaser of the advertising space.

A Yes.

Q Is that right?

A Yes, I did.

Q Can you give us the addresses of those? Let's take Edward D. Cuffe on page 1 of the stipulation.

A In the case of Mr. Cuffe, he was in Upper Montclair, New Jersey. On the stipulation it is listed under column 2 although it wasn't an agency as I recall. It was an individual.

THE COURT: I just can't imagine a document that is really less descriptive and the point we are interested in is, first of all, was the advertising placed interstate.

It seems to me that it's fairly easy to arrive at that and to describe it in plain English. If the agency or the office of the agency with whom Mr. Peterman dealt was in Detroit or St. Louis, then that is a factor and it should be laid out so that it isn't confusing.

Secondly, if Mr. Peterman dealt directly with the advertiser rather than through an agency, then that is a fact that ought to be able to be laid out and the location of the office or the agency or the party that he dealt with on advertising is, of course, crucial here.

Then you have got the other aspect, not just the sale of the advertising, but the products which were going to be involved that were being advertised and so that's another question. Were the products going to come from Detroit or St. Louis or some other place.

Now, I can't for the life of me tell any of that information except, you know, maybe on a hit-and-miss basis from this document.

MR. PRATT: Your Honor, the easiest thing would be just to go through the individual items and we will start with Category 1 and make it clear.

THE COURT: I thought that is what you were doing by preparing a document.

Q Mr. Peterman, can you tell us, did Rockwell Manufacturing Company advertise in Taxi Weekly?

A Yes.

Q With whom did you deal in obtaining or getting that advertising?

THE COURT: I will tell you right now I am not going to sit here and hear testimony on every item in this thing. It was the attorneys' job to get this stipulation in an intelligible form and you had better do it. We are not going to sit around here while it is testified to.

MR. WENTZEL: Your Honor, if I could respond to that, we had tried to work out this stipulation all through the trial and got nowhere because we kept getting objections to headings and everything else, and that is why I put Mr. Peterman on the stand on the last day of the trial after trying to get a stipulation, faced with the only alternative, was to put him on and go through them one by one. I didn't see any other way to do it.

We just got this stipulation --

MR. TURCHIN: They didn't just get it. It was dated July 24 and I called him on Tuesday for any kind of response and he never returned my call.

THE COURT: Wait a minute. I am not going to try to get into the question of whose fault it is. I am just saying that right now I think it is a little difficult to go down here point by point.

MR. WENTZEL: The stipulation at least sets forth the amount involved. We are happy with it for that purpose.

THE COURT: Did you ever draft anything and send it to them that had it laid out in plain English like I have just mentioned?

MR. WENTZEL: Yes, your Honor, before the trial.

THE COURT: Where is it?

MR. WENTZEL: In our proposed stipulation.

MR. TURCHIN: It doesn't say that, your Honor. It is the stipulation I am sure you are aware of, your Honor.

THE COURT: Where is the stipulation covering the --

MR. TURCHIN: It is the totals.

MR. PRATT: We have broken it down only to the extent of these eight categories.

THE COURT: Let's see that.

(Discussion off the record.)

THE COURT: Maybe if there aren't many out-of-state entities that are discussed here, maybe this Category 1 is the only category that has out-of-state entities. Is it?

MR. PRATT: I think that's correct, your Honor. The other categories deal with entities located inside the State of New York that we contend are in interstate commerce.

THE COURT: How do they affect interstate commerce? You mean Category 2?

MR. PRATT: I mean that the products themselves are in interstate commerce. For example, Category 3 are automobile dealerships. Cars are manufactured outside the state and are sold inside the state.

THE COURT: I will tell you, I just get very suspicious when I see opportunities for confusion the way I see here.

MR. NESSEN: Your Honor, I am sorry, I couldn't hear you, your Honor.

THE COURT: I get very worried when I see the opportunity for confusion that I see from this document. It is a booby trap that somebody is going to contact one of these days.

Now, if the interstate commerce issue is so simple that you don't need this proof, then don't bother introducing any of it.

If you need this proof, put it in in a way that somebody can understand it.

Now, I really object to taking the time and sitting here and having a witness go through and describe item by item the significance and the geography of page after page of these items. I think that the lawyers could assist me and not prejudice themselves by getting together a stipulation that isn't a summary the way you had in your original thing, but takes these items and describes them in some way that is intelligible and let's just review it.

I think basically you want to know the facts about the interstate placement or sale of advertising, that is, was there advertising bought by or placed by an agency or an advertiser or an office of an agency or an advertiser outside of New York, and that means describing the product, the agency and something about the volume, and where they are located. Whether it is an agency or an advertiser.

Secondly, you are interested in the products that are being advertised. So what is the product, where does it come from, who is the manufacturer.

Now, the big thing here is automobiles, and maybe you don't have to have every last nook and cranny covered, I don't know. That is really up to you, but I think that a lawyer could sit down and make something out of this in some intelligible fashion.

Now, if you want to rest your case solely on the idea, and I frankly think this is just about enough, that you have got advertisements of Dodge and Ford and Checker autos in this publication. There are a total of, as I gather, something like 11,000 Medallion taxicabs in New York City. 11,000 multiplied by the average cost of a taxicab is a lot of money.

I don't know how many taxicabs are bought and sold each year or anything like that, but, you know, that if it is properly developed, it seems to me is probably the biggest thing in the whole picture.

Then of course you have got these taxi meters and maybe you have got some radios and you have got some tires and all, but shouldn't you -- isn't there a way this can be developed so we don't have to sit here all afternoon and hear testimony about it?

MR. WENTZEL: Your Honor, as I look at this, for instance, if you look on page 5 -- do you have a copy of Exhibit 115?

THE COURT: Yes.

MR. WENTZEL: The automobile dealers there are grouped together as category Number 3.

Now, admittedly what is not shown there is the fact that Dodge automobiles are made out in Detroit, Michigan or somewhere else, which I suppose perhaps should be added to the material there, although, as I think about it now, the ads themselves, of course, are in evidence in the form of the bound volumes and undoubtedly reflect a lot of that information.

THE COURT: I know Dodge is made in Detroit.

MR. WENTZEL: That was my reaction. I think that was why it didn't occur to us to put that down there.

THE COURT: I can't help but observe that the interstate commerce point, there must be something you want to pre[illegible] that makes a coherent presentation of the necessary elements, and I don't know what that is exactly, but I would think that it would be better thought out than what I seem to be getting here now.

Certainly, suppose I was coming at this afresh. Would I be able to read this document and know what I was reading?

MR. WENTZEL: Well, in the case of -- basically it is broken into four or five categories and, as I see it, as long as the amounts are in here and their names are in here, all we need to do is develop just what those categories mean.

For instance, the first one is basically advertisers that are located outside the State of New York, so that the advertising itself traveled across state lines.

The second category starts on page 3 and consists of what we have contended are national advertisers, that is, advertisers of products sold interstate or traveling interstate in some fashion who are located within the State of New York.

THE COURT: Category what?

MR. WENTZEL: Number 2. When the Hotel Manhattan advertises in Taxi Weekly, that does have an effect on interstate commerce. It is advertising for interstate travelers. That in general is true.

That is the kind of category that Number 2 is. It can be argued about, but that is what it is.

Now, Number 3 is automobile dealerships and they are all listed starting on page 5. Those are local dealerships in the City of New York who sell products that themselves are transported through interstate commerce to be sold here. Those are the taxicabs.

Number 4, which is on page 6, consists of advertising of used cab sales. Now, in that case it is obviously somewhat different. The automobile was made in interstate commerce, but it may or may not have been transported in interstate commerce lately. Obviously it was probably a situation, we can't tell at this point, where it was a cab that was sold in the City of New York.

THE COURT: What is Category 5?

MR. WENTZEL: Category Number 5 are service stations, that is to say, gasoline and oil products, stations in the City of New York who again are selling products, principally petroleum products, tires, batteries and accessories, to cab drivers, fleet owners and so forth.

Again, this is the sale of products which have traveled in interstate commerce. It is the advertising of those products in this newspaper.

Category Number 6 again is a listing of tire companies, air conditioning companies, various kinds of equipment and accessory companies directed at taxicab drivers and owners, which again are principally items that traveled in interstate commerce to New York to be sold, and they are advertised in Taxi Weekly.

Category Number 7 are hotels in the State of New York which are advertising their hotel in Taxi Weekly for the purpose of attracting at least in part and certainly primarily I would think interstate travelers who arrive at airports and so forth.

THE COURT: Isn't that the same as one of the other categories? You have a lot of hotel advertisements in Number 2.

THE WITNESS: Your Honor, if I may explain that. The earlier category consisted of a hotel company that was interstate. The hotel was a part of a larger group, part of a web and nap that were an interstate company, and that is why they were put in that category.

MR. WENTZEL: I see, some of the larger hotels that are part of chains are in Category 2.

THE COURT: I am probably not able to articulate my problem, but I just in general feel that we are not getting a coherent presentation here. There are a lot of items put in the stipulation.

Even what you explain to me now is not in the stipulation admittedly and it probably can't be. Other people won't stipulate to it, and I know it is just a matter of mechanics if the witness testifies as to his idea of the categories, and then whoever is reading the record can take this stipulation and read his testimony.

Well, that is no huge problem in a way, but I still have -- I just return to the same statement I made. I have a feeling that there is a lot of material here, I don't get a lot of sense out of .

Let's take a break and think about it, but let me just explain to you what I think would be helpful.

I will start by saying I haven't done a lot of reading in this area so I really probably shouldn't be the one to guide it this way.

It seems to me that there should be a listing where the categories are labeled in plain English where you spell out the different types of advertising and that is, of course, important, but I keep thinking that probably beyond that the most important because it will be most important in terms of dollar volume of the products advertised.

Now, what developments you should make on that, I mean that is your job, but the fact that a few hundred or a few thousand dollars worth of advertising for Dodge cars or taxis is placed is to me only one part of the picture.

The other part of the picture is that perhaps hundreds of thousands of dollars or tens of thousands of dollars worth of taxicabs that were sold over a period of many years and potential sales and so forth of taxicabs that come in from Detroit or wherever these cars are made. There are tires, radios, spark plugs.

Now, this list has a bunch of names on it. I don't know what any of these people do, whether they make automobiles or seat covers or protective shields or car mirrors or what.

Now, it is possible that we sit here and have testimony, but I have a strong feeling that nobody is even ready to produce the testimony because you are sort of relying on the stipulation, and I see the stipulation and it doesn't tell me very much.

MR. WENTZEL: Other than the first category, the others are identified by the type of products, so that is not a problem and we are prepared to go through the individual items of Category 1 to identify what type of product was being advertised.

THE COURT: Let's take a break. Just think about it. Maybe I am making a bigger problem than exists, I don't know.

(Recess.)

THE COURT: I don't think you are getting what I am talking about and I am probably not getting what you are talking about. I rely most heavily on the Supreme Court case in Lorraine Journal against United States, 342 US 143, and I am talking about page 151 and I will read it.

There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of products sold.

Now, when I told you and I told the defense that I considered that there was in the case or was offered to be proved enough to sustain interstate commerce jurisdiction under the Sherman Act, I was talking basically about this passage, and I considered that from what I had heard there would be proof about the gathering of news, although frankly I didn't think that was overwhelming to say the least. I considered that there would be proof about the placement and sale and purchase of advertising.

Now, I think that that is to some extent covered in the stipulation, although it is a little cryptic, but at least that was the main point in that stipulation.

The element referred to here as the interstate commerce involved in the sale and delivery of products sold, that is sort of hidden in the stipulation. I know, you know, it is there, but there is not much about it.

Now, what I want to say to you is this: That I went out on a limb in order to shorten this case by saying that I would rule as a matter of law there was enough interstate commerce, but that presumes a pretty airtight case on that point, and I have no doubt in my mind that such case exists or otherwise I wouldn't have said what I did, but as long as I went out on that limb, I want this record clear.

I don't want it in a state of confusion, otherwise I will reverse my ruling and that is not a real possibility, I think the proof exists, but I want it clear because if I said as a matter of law that there is interstate commerce, there should be a record clear as a matter of law without any possibility of confusion or somebody saying there is an issue of fact which should have gone to the jury.

I don't believe there is such an issue, but it's got to be clear here.

Now, I think you have got to think through the different elements in this Lorraine case and come up with a presentation which lays it out, and if you want to try to do that today, if you want to finish today, fine.

If you want to think about it, okay.

One possibility, this is something we did I think earlier, if you have got a lot of sort of statistical facts, a lot of things to be listed and the defendants won't agree to those things because they don't know enough about them or they don't like your characterizations, then one way to do it is to prepare it in writing and then have Mr. Peterman adopt it as his testimony. That you could do with this stipulation if you want to expand on it.

Do you get what I mean at all?

MR. WENTZEL: Yes.

THE COURT: The thing is I think that everybody worked very, very hard at the trial on the issues about liability and maybe the interstate commerce thing is a little bit, you feel, well, the Court has ruled and you don't have to lay it out too thoroughly.

I think it has to be laid out because it is in a more sensitive position than even the case that went to the jury. It's got to be cold turkey or else there wasn't any basis for the ruling.

MR. WENTZEL: Let me say this, your Honor: At various points during the trial I put in matters that not only affected my ability, but also in my judgment had a bearing upon interstate commerce, and also during the course of the trial I started a couple of times to go into interstate commerce and finally your Honor made a ruling.

In coming here today I was working under the feeling that you wouldn't want me to take up the time to go through all the things that are already in the record, although we don't have a nice neat summary of them right here.

THE COURT: What is in the record?

MR. WENTZEL: There are a number of things. For instance, basically the kind of thing we have been talking about here today is on what I think we have referred to in our briefs and requests to charge is the second test of interstate commerce, that of substantiality. Whether there was a substantial effect on interstate commerce.

There was proof during the course of the trial relating to the first test concerning interstate commerce and that is whether the conduct complained of itself directly affected some part of the interstate commerce of the plaintiffs' business.

Now, of course in that respect we did prove, I think, that there were efforts to coerce advertisers and particularly Rockwell, which was an advertiser who placed his advertising from outside New York into New York.

Chrysler, which placed its advertising from Detroit into New York.

And one of the automobile dealers, Future, which, you know, is engaged in advertising interstate products, that is, automobiles, so there is that aspect of the interstate commerce issue which we contend, of course, is an important one which already took place earlier in the trial.

There are also --

THE COURT: I guess this: It is abundantly clear from what we have right now that, first of all, there were 11,000 odd Medallion taxis operating at this time.

Further that the taxis would need tires and taxi meters and a variety of other accessories. They would need gas and oil and, of course, there were the taxis themselves, Checker, Ford, Dodge.

That much, and I guess there is no dispute that at least the automobiles were manufactured in large part outside of New York. You know, nobody has raised the fine points of a New York assembly plant, but I think that unless I hear to the contrary, I think we all would assume, and I think it is in the record, that the taxis themselves came from out of New York, were manufactured outside of New York and shipped in.

We have the evidence about the taxi meters coming in from Pittsburgh.

Now, maybe that is enough.

On the other hand, in thinking about it I, for instance, in looking at the car trade case where they talk about the dollar volume of the cars that might be influenced by this type of activity, they talked about dollar volume, so it would be of some interest it seems to me to go ahead and not just leave it that, yes, there were cars and there were taxi meters, but maybe present some kind of proof about volume.

In other words, if you were starting out to think about what would be the kind of presentation to make on this point, as I was thinking this morning about the kind of questions that came to my mind as we were talking, I think that you know you are on a little firmer ground and I would feel on a little firmer ground if I knew -- if I had a little more comprehensive picture, not that it is absolutely essential, but it would be of interest to me to know what is the dollar volume of the taxi meters. How many are sold in a year. That kind of thing.

I don't know. I don't think it has to be down to the last dollar.

Then we had reference to those other things. You have got different other entities that are apparently manufactured products and you have got filling stations.

In other words, I am just saying that so that to the extent these things have meaning, maybe if you sat down and tried to think about it, there is a kind of development so that you would come up with a little more coherent picture.

I think there are bits and pieces of proof in the record now, but it doesn't go all the way.

Could you do this: I think I would like to take a recess until 2:15. I would like to have you come back. I think we will go ahead regardless of whether we can finish the interstate commerce point today. I will go ahead with the other matters and we will go ahead on the motions of Mr. Nessen and the attorney's fees.

You think about what I have said. It may not have been all that clear, but think about it over the noon hour and each side, it seems to me, think about what their side would be if they were starting out now and they were thinking afresh about it and they wanted to make a presentation either for or against interstate commerce, what are the building blocks of that presentation.

I will see you at 2:15.

(Luncheon recess.)

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AFTERNOON SESSION

2:15 p.m.

THE COURT: I would like to make this suggestion. I would like to rule today on the motion for a new trial. I would like to discuss with you the attorney's fee application.

We spent a long time discussing the interstate commerce point, and I certainly want to hear if you feel differently than what I proposed, but I believe in the long run it would be a wise thing for us to defer this, and I would suggest that you go back, Mr. Wentzel, I think it would be helpful to prepare a memorandum.

MR. WENTZEL: That is what occurred to me, your Honor, perhaps I should pull it all together in one place and submit a memorandum to you.

THE COURT: Then you know what you have got and what you don't have.

MR. WENTZEL: I had the same thought.

THE COURT: Then, we floundered around today and then serve it on Mr. Nessen and Mr. Turchin, and they are in a little awkward position because I have in fact already ruled, but I think they ought to be put on notice that they are not going to be able to take advantage of silence to trap anybody. They wouldn't want to do it anyway, but I think to have this thing intelligently briefed, even though we are in kind of an odd procedural posture, I would expect them to point up any deficiencies and if they are real deficiencies and they have to be remedied, we will handle them in an appropriate way.

MR. NESSEN: Your Honor, I have difficulty hearing you, I am terribly sorry.

THE COURT: I just think that when you get a memorandum from Mr. Wentzel on interstate commerce, you are in a little hard position because I have basically already ruled and we are making a record and I know that, but what I was saying is, and I don't think you would even dream of doing any such thing anyway, but I think that still it would behoove you to point out any deficiencies on the interstate commerce record now rather than to wait and do so on appeal.

So I would expect you to respond and point out in what way you think there are deficiencies and we will handle them in an appropriate manner.

Now, I think as part of the memorandum there should be a suggestion of what additional proof would be offered and we have, although today I think we didn't come out so well on this particular stipulation, through the trial we were able to handle these rather detailed factual

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matters in a fairly efficient way by charts and lists and so forth even to the extent that it cannot be stipulated.

So if you could work out your proposed completion of proof and include in a memo what you feel has already been proved, what you need to prove, what under the law you think you have proved and what you believe you need to prove, you still need to prove and how you intend to do it and then Mr. Nessen will suggest any proof he wants to put in by way of contradiction or rebuttal. Let's let the interstate commerce point go at that.

I think, then, let's take up the two items and that is the motion for a new trial, and I haven't given Mr. Nessen a chance to say much of anything this morning, so if there is anything you would like to add to your papers by way of oral argument, I would be very happy to hear you, Mr. Nessen.

MR. NESSEN: Yes, your Honor. I can't help being disappointed in your remark, your Honor, where you indicate that you will probably deny our motion for a new trial, and I don't want to belabor the point. I would like to think that I would accept defeat gracefully, but I do think --

THE COURT: Go ahead.

MR. NESSEN: If you still have an open mind on this issue, your Honor, that I think that by all the

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objective standards that the reaction that I had and I dare say the Court had to the size of the jury verdict was founded on reason.

I agreed that the jury verdict ought not to be upset very easily, but I think we all agree that there are bounds. I think that during the course of our settlement talks, during the course of the trial itself, we recognized that there are bounds that a jury can go through.

Now, I have analyzed, I think, your Honor, and I know you have looked at my papers and I hope you have looked at my reply affidavit, too, although I didn't introduce it.

It is Kobak's testimony that is the key. It was accepted, your Honor, and I don't think I have to belabor the point to you almost totally with a minor discount, but there were things, it was very specific that he said he took into account and there were things that he did not.

Your Honor, for whatever reason it was, Taxi Age was a surprise to us in this case. Mr. Kobak based none of his testimony on Taxi Age.

Your instinct and all of us here at counsel table when Taxi Age came up was, well, gee, we have been dealing with Taxi Weekly and that is what we thought we were dealing with. It does seem to me that on any rational notion that there had to be, there must be a substantial discount, a

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substantial thinking, rethinking in light of that testimony on Taxi Age.

I know your Honor has suggested that Taxi Age came up in a most dramatic way in the trial. I don't think so. I have been thinking about it and have lost a few sleepless nights thinking about what I would have done or should have done had I known about Taxi Age.

There is no question there would have been pre-trial, there is no question there would have been a postal inspector. I have seen all sorts of things that I should have done.

One thing I know and it is not on the record, but I will state it now. I have showed it about delaying this trial if I had known about Taxi Age, and I would have gotten Walter Grimes on the stand to see if he was told about that, but Taxi Age is there. It must have been. It has to be a factor on that second-class permit and, your Honor, all you have to do is look, one-cent, two-cent difference on each paid newspaper here obliterates the profits in this case.

Apart from all the other notions. Your Honor, if you recall when Taxi Age came out in the course of examining Mr. Kobak, sustained an objection to it that was made by my co-counsel and then you thought about it over the weekend and allowed the plaintiff to go ahead and to explain

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Taxi Age.

THE COURT: But the point there was that you were going to bring it up by way of defense, and it was pretty obvious to me that I couldn't let you bring it up without everybody bringing it out.

MR. NESSEN: With due deference, your Honor, if you had excluded Taxi Age and if the stipulations had all been left out, it was our intention merely to say that this man, Kobak, based his testimony on 5,000 or whatever it was, rather on 11,000 and 12,000 and 13,000 when the circulation of Taxi Weekly was different.

No, your Honor, our intention over the weekend was that we were very happy with your Honor's ruling. I am not saying that --

THE COURT: Maybe we had a slight misunderstanding.

MR. NESSEN: It doesn't matter.

THE COURT: I get your point.

MR. NESSEN: The point is and I think, your Honor, we are here with a motion not on technicalities but a question of justice, and I have been impressed and I stated on the record here that your concern throughout this trial to do justice is a very impressive thing. You have thought aloud with us and we welcome it and that is what I am concerned about.

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I am concerned that I didn't do the job for my client really by not impressing really the basic bottom line here, and the bottom line is that this business couldn't have been worth $225,000.

You take Kobak's testimony, it is ephemeral, we couldn't find out where he got the ten. We don't know where he got it.

We know what he considered and what he didn't consider. We know that he didn't know, obviously, that $150,000 had been an offering price for this business and there were no takers.

I mean I just, for example, he didn't consider, and this is important and maybe there is a misunderstanding, but he didn't consider what Mr. Harnett says is important and we must know is important, the fragileness of the good will here.

The point about what happened in the spring and what happened later was that when you have a business that depends on one segment, seven-eighths of its paid subscription, it is a delicate thing, and even if there had been no dispute, no dispute, you just don't take multiples of earnings as if you are dealing with General Motors or McGraw Hill or anything like that. You have to look at it, and the thing about the dispute is that it shows how fragile,

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how dangerous a business is like this.

To pay 225,000 in the real world, your Honor, that is just not right. I submit --

THE COURT: The thing is this is a point of view. Now, if the jury had agreed with your point of view, surely I would not have overruled the jury verdict to that, in that point of view, but the question is is it so clearly the only or the right point of view that I would be fair and right in ordering a new trial.

As far as anybody not doing well by their client, everything that you talk about now was presented, I would say, in the most vivid, forceful manner by you to this jury both through evidence and through argument, and the question of the fragility of the thing was presented very much for the jury, but there were two sides to that, and it seems to me the plaintiffs' case was it wasn't so fragile except when illegal activity started.

Your viewpoing was it was fragile and the illegal activities simply sawed off the stump. The plaintiffs' case was this was a good healthy tree and the illegal activities toppled the whole tree.

That to me, there was the issue and there wasn't, I don't think, another word of proof that would have added to either side on that issue. It was gone into really in excellent detail.

How can you say that there is only one point of view.

MR. NESSEN: I don't say there is only one point of view. We are talking about the weight of the evidence and that is the function here.

THE COURT: Sure.

MR. NESSEN: We are talking about the weight of the evidence. I am not saying there was one point of view, but if Mr. Kobak, as the expert, could say that he didn't consider that, didn't list that, that just strains credibility.

THE COURT: But you recall in my charge I pointed that out. I felt that and it was reflected in my charge that the damage issue was a very crucial one, obviously, in this case and it always is, but, I don't know, here there had been a great deal of attention given to it, so it was an important part of the charge. That goes without saying.

But in the charge the jury was apprised in no uncertain terms of just what you are saying, but it was left for the jury.

MR. NESSEN: Right.

THE COURT: To determine: Were the factors which Mr. Kobak had not taken into account, were they factors

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which he should have taken into account. Now, that was really a jury question.

In other words, did those factors exist and the jury obviously, we must assume, found that they were not weighty factors. That is really the question.

Is the jury irrational, is it clearly against the weight of the evidence for the jury to have said, okay, Mr. Kobak didn't take those factors into account, but we don't believe those factors existed in any important degree. Was the jury -- could the jury not so find?

MR. NESSEN: Not in this case, not at all. Let's take for a minute and let's eliminate the question of the dispute whether it existed or not.

The fragileness or fragility or whatever the word should be exists There is no question of that.

This business depended on one segment of an industry. There is no question of that.

Taxi Age is an absolute fact. There is a problem. Mr. Peterman himself, his testimony which is so vague, but if you believe it, he knows enough to ask postal inspectors about it. That exists, your Honor.

The question of the lack of growth in the industry. Mr. Kobak said that was a factor, but he couldn't quanity it.

I brought out from his own articles that it was a

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must in those years; that you had to have that growth; that the jury didn't discount that again weighing it all together --

THE COURT: But that growth was really for the purpose of persuading advertisers to increase their rates.

MR. NESSEN: And there was no effort to increase the rates here, your Honor, and it is more than that.

THE COURT: The need to increase rates was needed in his view in general to cover inflation, but there was no evidence that the advertising profits or however you call it were getting so badly eroded here, regardless of whether you call it offers or salaries or profit, the owners of this paper had some $60,000 in cash at the end of the year to do with what they wanted, call it salary or profits, didn't they?

MR. NESSEN: Your Honor, the question is not what had happened, although to a degree I think there was an erosion as we saw on circulation, for example, there was erosion, there was lack of growth in the company, no question of that.

Mr. Kobak said it was a factor to discount, but I say he didn't think enough about it on his own writings, on the question of inflation in the future. That is what you are talking about.

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What is the value of this business as a going concern, and if there was a pattern of no growth, it's a big danger sign.

Now, I am not saying that that means that zero. I am saying that taken with the weight, taken with Taxi Age, taken with the fragility of the business, taking it with really the existence of a dispute somewhere, and I think it is obvious that it was in part a personality problem or what have you, the McIntyre dispute is unquestioned, your Honor. That existed.

You can feel and touch that.

THE COURT: Was it in the paper?

MR. NESSEN: The depositions are interesting, your Honor, the testimony that comes out. They were disturbed and this comes out that the paper wasn't telling enough about the taxi industry's belief in the fringe benefits.

THE COURT: Mr. Nessen, did you take out a single issue of that paper before that jury and say, ladies and gentlemen, here is the article that distorted, that was the problem. Was there a single deposition witness among the defendants that was presented with an issue of the newspaper and said, this is what I was referring to.

This was a question of credibility whether those deposition witnesses were lying or not.

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MR. NESSEN: I understand, your Honor, but take it this way about the dispute. It's very hard to show what a person didn't do. It's awfully hard to say, gee, this is our newspaper, he should be trumpeting.

We knew we had to take out and did take a full-page ad out. We knew that McIntyre's press release was denied and in fact denied in general terms, I wasn't going to take any more of that.

THE COURT: Who was the fellow -- that was McIntyre. There had been an earlier visit by whom?

MR. NESSEN: Excuse me.

THE COURT: McIntyre is dead now, right?

MR. NESSEN: Yes, he is.

THE COURT: But there had been an earlier visit in April.

MR. NESSEN: By Bartman.

THE COURT: Bartman isn't dead.

MR. NESSEN: No. The testimony here of Bartman we were happy to leave the way it was. He asked him, according to Mr. Peterman, you should be crusading like in the old days, and the fact that, I am not saying who was right or wrong and I think your jury charge was perfect on that, that you don't say who was right or wrong, the fact of the matter is there was some sort of personal dispute,

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some belief that Taxi Weekly should be doing more for those who supported it.

I say two things about it, and I don't want to argue it because I know your Honor's feelings about it, so I won't emphasize it with you because I don't think I have to, but I say two things.

It illustrates what Mr. Harnett said, what Mr. Kobak should have admitted, that when you have a business like that where they are tightly knit, you just don't go out and pay $225,000 for it. That is not the real world, your Honor, I submit.

Then going down the list, I don't have to tell you about the $15,000 salary. Just take Mr. Kobak's statement. We all recognize, you don't fire Mr. Wysinger, you don't fire Mr. Peterman, you look at the ads on the 31st or the 32nd anniversary, all these wonderful ads from our people for Mr. Wysinger and Mr. Wysinger would get them, you don't throw away that good will, and Mr. Kobak had to admit, well, I can't, gee you keep him around. You know if you keep him around, as Mr. Harnett said, you would have to pay him for keeping him around or you would lower the purchase price or whatever it is.

You just don't throw away the good will there.

The question of change of policy. I think it is

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there. I think there was a change at least in the character, the going forth, the way Mr. Peterman responded in the spring of 1964. He had never told McIntyre to take his press releases and take them out before.

Then, your Honor, there are the hard facts. I don't have to belabor that. There is the $15,000 paid in 1958, fiscal '59 actually. There is the $50,000 paid. There is the 150,000 offer with no takers.

You look at the 50,000, discount it by a crude income. Discount perhaps a little bit because of the surplus. Realistically maybe 35, 40,000 at most. Think of Mr. Peterman and his personality and his longing to have his own newspaper, to be an independent newspaper, and think of the premium for control.

Think of the fact that maybe it is a fact and I argued it sincerely to the jury, but your Honor doesn't have to accept it that at the same time he was offering 50,000 he was trying to sell it for 150. Whatever that be, it does seem to me the hard facts added up to all these other factors that it is an unreasonable verdict.

It is a verdict based a lot on sympathy I have no doubt. The response to a man put out of business and a sympathetic person at that.

It does seem to me it was a very quick verdict

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and it does seem to me that when you add up all these factors, each one of them, that somewhere to say that you discount by less than ten percent, the testimony of Mr. Kobak, that that is not doing justice particularly when it is trebling.

THE COURT: Mr. Kobak had recommended a figure of 250 based on a 25,000 assumed profit multiplied by ten.

You can suppose, I guess, that what the jury did was to take the 25 and give it a nine multiple or maybe they didn't do that, but, okay.

Let me ask you this, I wish I had the financial statement, but what was the -- we have seen those figures so many times, what was the '64 profit before officers' salaries?

MR. PETERMAN: 57,000.

MR. NESSEN: 57,000.

THE COURT: Okay. You took out 6,000 in officers' salaries leaving 51, was that it?

MR. NESSEN: They took out 47,000.

THE COURT: Just the other way around.

MR. NESSEN: Just the other way around, your Honor. I haven't said anything about taxes.

THE COURT: Does anybody happen to have the financial statements?

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MR. NESSEN: Let me see if I have it.

No, I don't have it.

THE COURT: In other words, it was 57 before officers' salaries, right?

MR. NESSEN: Right.

THE COURT: Then you took out what you call officers' salaries, I thought it was 51.

MR. NESSEN: 15 --

THE COURT: Leaving a profit of 6.

MR. NESSEN: 15,000, when you come out to 15,000 it comes to 25.

THE COURT: Wait a minute, if we could just reconstruct those two or three figures from the financial statement. In 57 the four officers' salaries and I think you took out 51 officers' salaries leaving a profit on the books of 6.

MR. NESSEN: Something like that, your Honor, in 1964, and it was about 300 in '63.

THE COURT: When Mr. Kobak recalculated the officers' salaries and came up with his 25,000 figure, he, of course, did two things. He reduced the officers' salaries to 15.

MR. NESSEN: And he took a three-year average, your Honor.

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THE COURT: Okay. Let's just take the '64 figures for just a minute. That gave him a net profit after officers' salaries of 42. Then, as I recall, he assumed both state and federal income taxes.

MR. NESSEN: Yes, he did.

THE COURT: Leaving 25, right?

MR. NESSEN: Right.

THE COURT: One thing that struck me as a possibility and I don't know, this was I guess not presented to the jury explicitly so you assume they wouldn't have discussed it, but I think Mr. Kobak did testify that his allowance for federal income taxes was an assumption. There was not in fact a separate income tax paid by this entity.

MR. NESSEN: No, sir.

THE COURT: So what I am leading up to is this: If we are shocked by a 225 figure, maybe one way to look at it is this: Let us assume that the jury disagreed with the defense position that the business was already in a weak, precarious position before the alleged conspiracy.

Let us assume that the jury discounted the defense position on that and felt that it was basically going along in its normal path until the conspiracy. That would mean that you had a business which was able to generate $57,000 in 1964 for the owners to have, whether they called it

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salary, whether they called it profit.

Now, I know I am probably veering on the lost profits theory, but it is worth tossing this out if you are talking about fairness and justice. You have got a profit of $57,000 or you have got a figure which belongs to these officers. I assume they have to pay state income tax, but they indeed did not have to pay federal income tax.

Where was the state income tax, was that in reduction of the 57 figure?

MR. NESSEN: Yes, it was, your Honor.

THE COURT: How much was the state income tax?

MR. NESSEN: I don't have those calculations, but I think your Honor is perhaps going off -- in your thinking.

THE COURT: Does anybody remember the state?

MR. WENTZEL: It was in the hundreds of dollars.

MR. PETERMAN: A few hundred dollars.

THE COURT: Not an appreciable amount?

MR. PETERMAN: No.

THE COURT: The thing is if you went out to sell this business, you might evaluate it higher than he did. You would be selling a business, let's suppose, before any news of conspiracy you went out and offered the business.

Well, I think I would tell people, here is a business that Wysinger and I are able to, you know, we have got $57,000 this last year. We don't have to pay any income taxes to the federal government. We pay a small New York State --

MR. NESSEN: They have to pay income taxes.

THE COURT: After it is distributed to them, but the corporation doesn't have to pay it.

MR. NESSEN: But if you sell it to a big corporation, they are not entitled to that.

THE COURT: Who said they would sell it to a big corporation.

MR. NESSEN: You are still paying income tax. Someone has to pay income tax on that.

THE COURT: Can't that someone call it a subchapter S corporation?

MR. NESSEN: Of course. Also, if you could find a buyer, they would still have to pay taxes on it.' I mean it is not free.

THE COURT: I am not saying it is free, but I am saying that they have managed to eliminate by this device the dual taxation that is the first the corporate tax and then the individual, so as far as what this corporation is able to earn for its owners, it is basically $57,000 a year.

Now, let's compare that -- are you going to sell that for $12,000? Mr. Harnett says it was only worth 12 or

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it was nominal.

Well, he had his reasons and the jury might have accepted that, but if I were the owner of that, I will tell you right now, I wouldn't take 12. I would say, look, in one year I can earn five times that.

MR. NESSEN: What you do in these situations usually, we know that, is you have a pay-out basis, but we were trying to evaluate when you have a business like this, when I come forward and say, I generate 57,000. Mr. Wysinger and I, but Mr. Wysinger has been in the business for 31 years, I got to these meetings, I am dependent on those very limited groups where we are essentially supported by one segment of an industry.

I would have to tell them the whole truth, your Honor. That is the point. You have to say the whole truth.

The whole truth is that this is a fragile business. You recognize that. I have no guarantee that I am going to give you my good will.

THE COURT: You see, I think one must assume the jury found that the only reason it was fragile was the conspiracy and how can you really say they had no basis for that.

MR. NESSEN: No, no. I agree that there are factual issues, but there is nothing -- there is no dispute

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about the fact that this business depended on one single segment of the industry and there can't be any question of that and it had to be a factor.

You can't go out and say, look, Mr. Wysinger and I did $57,000, but we have to account to the fleet owners. We have to do this, we have to do that. Tomorrow they may not like the way I part my hair, you have to reveal all that.

As a realistic matter, it just shocks the conscience and it is a horror to live with especially in this field of treble damages. Wow, it gets to be a situation where you ignore what you would put on tax returns, completely ignore them.

I don't think that is the rule. We certainly will argue that on an appeal and it is a legal question, but there is also a factual issue there. I just don't think that a CPA puts down compensation without any basis for it.

Mr. Peterman was worth something. Mr. Wysinger was worth something and they weren't worth $15,000. I would have bought Mr. Peterman for 15,000 in spades or Mr. Wysinger and Mr. Peterman for 15,000, but they wouldn't work for 15,000. I mean that is not in the real world.

What I am afraid has happened and what we lose sight of are the hard facts. They get lost and, sure, you

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had an expert on the stand who testified elsewhere and I won't comment on that, but he is an expert. He gives his opinion. He is not unbiased, we know it. We know in the real world --

THE COURT: You had your expert, too.

I will tell you, I have got to hear from Mr. Wentzel, but you must realize that this was an intensely interesting case for me. The record shows that I had a surprise reaction to this jury verdict. I was surprised that it was as high as it was, and I think the record shows it and I don't deny it for a minute, but, as I said in our meeting we had a few days later when I called you all back, I feel that that surprise really in a way reflects that I have a different function than that of the jury, and where you have got six jurors who come up with the verdict they did, they were able to listen to this proof with a perspective which I may not have had at that particular moment.

I had been concerned with procedures, with drafting an instruction, with all kinds of things. I had participated in some settlement negotiations and I really had to overnight in long conversations with my law clerk, we discussed this in as objective a fashion as we could, and what I am really leading up to is I really on my own initiative tried to think this thing through and I must tell you, I want to hear from Mr. Wentzel, maybe I am just anticipating, but I do want to say that I think my initial reaction to the verdict really was not anywhere as good probably as sound a judgment as what that jury came up with. There are very important reasons when one looks at this record and I think back up the verdict.

I want to hear from Mr. Wentzel. I guess the only reason I am injecting this right now is to just tell you that the matters you are raising are matters which in no way come as kind of, you know, a thing considered in an offhand way by any of us and I thought about them intensely really since the time of that verdict. So I will hand down a ruling, but I think I had better somehow cut short the discussion.

I will hear Mr. Wentzel.

MR. NESSEN: Your Honor, will I have an opportunity to put some other material, motions on the record that I don't think have been?

THE COURT: Surely.

MR. WENTZEL: Let me be very brief, your Honor. Your Honor is aware from our opposing papers given the standard that is to be applied here, that is viewing the evidence in the light most favorable to the plaintiff, as we must at this point after the jury verdict, I took that approach --

MR. NESSEN: I am sorry, I can't hear you.

MR. WENTZEL: Let me just move over a little bit.

I took that approach in my opposing papers, your Honor, and pointed out, I think, that while Mr. Nessen in most cases was referring to various bits and pieces of evidence, they were viewed from his point of view and, in other words, he was treating it in the light most favorable to the defendants, and on the other side of each one of those bits and pieces of evidence there was evidence that the plaintiff submitted as well.

If the jury chose to believe Mr. Peterman's testimony, to accept his credibility on the issue of Taxi Age, which was just an issue of credibility, well, that is the jury's function.

Since Mr. Nessen speaks of the fragility of this newspaper and whether or not Mr. Kobak considered that. Well, Mr. Kobak was asked that question on cross-examination and he said -- he was asked whether he considered it unique that more than two-thirds of the circulation would be dependent on one group in an industry, and he said, no, that is very common in the newspaper trade publication industry.

So it is not a factor that is out of his mind.

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It is something he knows about, that he is familiar with.

As far as the $15,000 salary, I don't know to what extent we could have gone into it any more. Mr. Kobak testified that that was his opinion as to what the salary was, and then he went back and looked at those manpower studies and he felt that they backed up that opinion.

That is evidence in support of that figure. If the jury chose to believe it, there is certainly evidence there to support their view.

I could cover each one of the points that Mr. Nessen has raised, I have tried to do that in my papers, but my point is that in every case, in every one of the points the defendants have raised, there is evidence in support of the plaintiff's view.

There is evidence from which the jury could adopt its verdict and I think the reason that the jury came so close to Mr. Kobak's view, as opposed to splitting the difference perhaps, is that the two parties took such completely different approaches in the course of the trial and it virtually forced the jury to accept one state of facts as opposed to another, and having done that, it is perfectly logical to me that they would follow and come very close to Mr. Kobak's opinion as to the value of this business.

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THE COURT: Do you have further motions?

MR. NESSEN: Yes, your Honor, just one remark that I think my papers make it clear that I believe that taking Mr. Kobak's own theory that not to have substantially discounted, not to was erroneous and against the weight of the evidence.

Your Honor, I did in the course of our discussions and on the record to make things move swiftly, we said things like the usual motions and I want to make it clear that I wanted a new trial, a motion for a directed verdict. I wanted I believe for each defendant that I represented there was insufficient evidence of a real conspiracy. That this vague evidence about pressure really isn't enough in this case. It is something that particularly to link each of these defendants, and I want to make that clear on the record in case there is an appeal in this case that that should be looked into.

Just because we haven't put it on the record, I think we would all agree was in trying to move things along.

I also want to make it clear that the Taxi Age matter, I believe, coming up the way it did warrants a new trial in and of itself completely on damages and indeed on liability.

I want to make it clear, too, your Honor, and I am not sure of this, that I took exception to the failure of your Honor to charge our damage section. I know we discussed it off the record beforehand and I am just not sure --

THE COURT: I am not clear about that at all. I don't recall any objection whatever made in a way that would apprise me of a problem about my damage charge.

As in most phases of my charge, I use my own language and I must say I counted on specific correction or suggestion. There just wasn't any.

MR. NESSEN: Can I leave it, your Honor, that I do note that there was a discussion about excepting to failures to charge in the way we wanted in general. Your Honor took the position that you had used your own language and where I thought it was understood that where your language differed from ours in any substantial way, we had an exception.

THE COURT: Look, the record will show what it shows. I don't think we will try to go over that now.

You are explaining what you intended to convey and that is fine.

MR. NESSEN: In addition, what else is there? I think the record is clear that we made a full judgment on a very motion, no question of that. We will leave it at that.

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THE COURT: Let me put my ruling on the record. All the defense motions are denied.

The only motion or only phase of such motions which I want to discuss briefly is the motion for a new trial based upon excessive damages. This motion is coupled with an alternative motion for a remitature to be set by the Court or the amount to be set by the Court for the plaintiff to accept in lieu of a new trial.

Both the motion for a new trial and the motion for a remitature are denied. I think briefly I can state my grounds as follows:

I am aware of the language of Judge Feinberg in Compton against Luchenbach, 425 Federal 2nd 1135, page 1133, actually Judge Feinberg is quoting from Professor Morris' text. Professor Morris says that in deciding whether to set aside a verdict and grant a new trial, the Court should abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result.

The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been, then it is his duty to set the verdict aside and otherwise not.

It is clear that it is not my function to act as

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a juror nor to simply set aside the verdict and grant a new trial simply because I might have done something else if I had been a juror.

With respect to damages, it is not my function to set aside the verdict as excessive or attempt to reduce it unless the verdict is clearly and greatly or grossly excessive.

In my former remarks a minute ago about not having the function of acting as a juror or setting aside a verdict simply because of disagreement, I do not mean to imply to any extent that upon my present considerations of the case I do disagree with the jury, but I was simply outlining a standard.

Now, the verdict was $225,000 and as defense counsel has brought up, this represents a virtual acceptance of the valuation figure used by the plaintiff's expert Mr. Kobak, who valued the business of the plaintiff at $250,000 based upon an estimated profit figure of $25,000 and applying the multiple of ten times those earnings.

The jury discounted this 250,000 figure by about $25,000, or I should say the jury discounted approximately the $250,000 figure down to $225,000. We don't know exactly how they did this, but in fact the 225,000 figure equals the assumed profit figure of $25,000 multiplied by nine.

The crucial issue here in my view is whether one can so seriously disagree with the assumptions used by Mr. Kobak that one must set aside a verdict based on Mr. Kobak's testimony. This is really the point made by defense counsel of the present motion, and it is the crucial factor.

It would take too long in the statement I am making to really give all the background so that my statement would be completely intelligible, but I won't attempt to give such background in detail.

Basically Mr. Kobak testified and the jury, of course, heard this testimony that in arriving at his $250,000 odd valuation he did not take into account the following factors:

He did not take into account any disagreement or possible disagreement among the principals of Taxi Weekly.

He did not take into account any disagreement or possible disagreement between Mr. Peterman and the fleet owner customers of Taxi Weekly.

It was also clear that he did not take into account any problem about the fact that one part of the papers were sent out under the heading Taxi Weekly and another part was sent out under the heading Taxi Age.

Now, it was the defense's strenuous contention that there was indeed a serious dispute between Mr. Peterman and Mr. Wysinger, the two principals of Taxi Weekly, that there was a serious dispute between Mr. Peterman, who was the active head of Taxi Weekly, that there was a serious dispute between him and the fleet owner customers of Taxi Weekly and that there was a serious problem existing by virtue of the fact that some of the papers were Taxi Age and some were Taxi Weekly.

The factual issue about whether these three problems existed or had significance were presented in the most thorough and vivid fashion to the jury and these were jury questions. The charge to the jury made it clear that they must consider these questions in evaluating the testimony of Mr. Kobak and the assumptions he based his evaluation on.

Mr. Peterman testified that prior to the time of the alleged conspiracy he had no substantial disagreement with Mr. Wysinger; he had no substantial disagreement with his clients, and his evidence was that the Taxi Age-Taxi Weekly manner of publication was something that had been done for years and years with no problem.

I am certain that the jury was amply justified in accepting the plaintiff's version of those issues as it obviously did. I am saying this as a result of a great deal of thought since the time of the trial, and I will say that I think the jury was well justified in accepting this point of view and looking at it with the perspective with which they did view the situation.

There are a few salient points that come to mind in drawing my conclusion. The defense -- or let me put it this way: Not one of the defendants ever testified as to this alleged dispute which existed between Mr. Peterman and the taxi fleet owners prior to the time of the alleged conspiracy.

No issue of the newspaper or any other really solid fact was adduced to show the nature or cause of such a dispute.

There was conclusory testimony of such a dispute in the depositions of various defendants, but such testimony was a long way from really explaining the point.

The jury was entitled to reject that deposition testimony, particularly when none of those deponents, even though many of them are still alive and able to testify, even when none of these people came on to the witness stand, although some of the people were sitting in the back of the court at times.

In my view the failure of these defendants or any of them to testify was something which the jury was entitled

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to give great weight to on both liability and damages.

In other words, what we have here are two strenuously argued and effectively argued sides of a case. The jury chose the plaintiff's side here and there was ample justification for doing so.

I would like to make a further statement, although it is extraneous perhaps to anything we are doing at the present moment, but it is something I would like to put on the record.

During the course of the trial there were many hours taken in discussions with counsel about the basic Anti-Trust problems raised in the case, about the law to be applied and about the type of jury charge to be delivered.

This discussion was off the record. The discussions were extremely helpful to me and all counsel presented viewpoints with great intelligence and thoroughness.

The result was the charge as given, and I would like to take a moment to put on the record briefly my thinking behind that charge. I won't attempt to give any detailed analysis or detailed discussion of cases, but it might be worth having a brief statement set forth.

Basically the plaintiff took the view on the law and took the view in its proposed charge to the jury that this was a per se violation; that this was a situation where the various defendants carried out a group boycott and that such boycott is per se illegal under Section 1 of the Sherman Act.

The plaintiff sought to apply the rule of the Broadway Hale case, 359 US 207 and other similar situations.

The defense side of the case took the opposite view and in large measure urged that the activities of the defendants were legal as a matter of law. They relied on the idea that the subscribers to Taxi Weekly had a free speech right to discuss among themselves their disagreement or dislike vis-a-vis Mr. Peterman and Taxi Weekly, and that they had a right to go as far as the evidence showed that they went, at least that such activity was not a violation of the Sherman Act.

In addition to relying on their constitutional right of free speech, the defendants placed heavy reliance on the idea that this could not be -- this activity could not be a boycott in violation of the Anti-Trust laws because there was no anti-competitive effect of the kind involved in the Broadway Hale case and other cases.

As we all know, the Broadway Hale case involved an alleged conspiracy by appliance distributors or manufacturers with a large department store to have the appliance manufacturers or distributors cease dealing with

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a discount house located next to the large department store.

There was an obvious competitive consideration or considerations involved in this activity. To benefit competitively the department store and even the manufacturers and distributors.

Again in the Eastern States Retail Lumber case at 234 US 600 there was a kind of boycott there with the intention to aid someone competitively or some group.

The defendants took the view that none of these cases could apply here because the activities of the defendants were not intended to aid anyone competitively. They were simply intended at the most to take steps against Taxi Weekly to express their disagreement or dislike or whatever of that publication and its principal.

That under these circumstances the Anti-Trust laws, which are designed to foster competition, can be applied.

In preparing my charge I rejected basically both of these views held by the plaintiff, on the one side, and the defendants, on the other side.

Incidentally, the defense relied on cases such as the car trade case, 446 Federal 2nd 289. The Seagram case, 416 Federal 2nd 71.

As I said, I rejected both viewpoints. I felt

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that the present situation had to be distinguished in some degree from the situation where a group of persons get together and have discussions and reach agreements about price fixing, anti-competitive boycotts and similar things.

I felt that there was no public policy in favor of such discussions, such agreements or anything relating to them.

On the other hand, I felt that there was a public policy in favor of having subscribers to a newspaper be able to get together and discuss their grievances and disagreements with that newspaper. Indeed it seemed to me that this was a constitutionally protected right.

I felt that the parties to such discussions could do anything which would naturally and inevitably flow from such discussions in the way of even agreeing to cut their subscriptions at the same time, as long as there was no coercion and as long as what happened was simply the natural product of free and constitutionally protected discussions.

This would be reasonable conduct it seemed to me. I believe further that there had to be a line drawn nevertheless between such reasonable or protected conduct and other activities that did not deserve such protection such as coercion by a small group directed at other subscribers, such as coercion directed at Taxi Weekly's advertisers and

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so forth.

I felt that in contrast to the defense position that such activities under the circumstances here would violate the Anti-Trust laws and that there would be an unreasonable restraint of Taxi Weekly's trade if such activities were carried out and caused it to go out of business.

As far as the anti-competitive effect, it seemed to me that there was a potential effect on competition at least in forcing one paper out of business where others might grow up or existing papers might grow and would be free from the competition of Taxi Weekly.

For these reasons the formulation of the law as set forth in the charge was used.

Now that I have gotten that on the record, I would like to take a recess a few minutes and then I would like to come back with the attorney's fee.

(Recess.)

MR. WENTZEL: Your Honor, before we move on to the next point, I would just like to make I guess a motion for the record.

I would like to move that the judgment to be entered in this action carry with it pre-judgment interest from the date of the filing of this lawsuit in September

1966.

In making that request I am quite aware of the Second Circuit law. There is one case and it is against my position and I am aware of that, but I want to make the motion for the record.

MR. NESSEN: There are many cases against his position.

THE COURT: Look, you are really saying that it is not the law in the Second Circuit.

MR. WENTZEL: I agree with that.

THE COURT: Your motion is a part of the record.

Now, let's get into the question of the fees.

What we really have is a challenge by Mr. Nessen to the quantity of hours spent, and I have got to figure out a way to resolve that. This is a big lawsuit in itself, in effect if you are talking about $250,000 or 200 or whatever it would be. That is a big thing in itself.

Now, I have got a real challenge to that from Mr. Nessen. It is unlike the situation that usually occurs in a class action case where there is no real adversary situation.

Here we have got some people on the other side who apparently are willing and want to have an evidentiary hearing before they spend $250,000.

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What is your suggestion as to procedures, Mr. Nessen? Do you want to cross-examine people?

MR. NESSEN: My first suggestion, your Honor, is that you look at these papers and you make a judgment and make a suggestion of what the fee should be based on all the circumstances. If that is not acceptable to me, I will let you know very promptly right now.

If you feel as I feel that a substantial fee cannot be had, there are two things that would have to be done. There would have to be documentary discovery and I would certainly like to know, I am not about to cross-examine honorable people, but I would like, for example, to know how much paralegals get at Casey, Lane & Mittendorf. I would like to know how much, for example, the hours that back in 1970 Mr. Wentzel charged corporate clients for his time.

None of that is in the papers. Everybody goes for $85 to $90 an hour. I don't know any of that. I may have been a little harsh in my papers, but it did seem to me that there must be some error somewhere where it takes 17 hours for a note of issue or 43 hours to make up a motion to substitute or even some 43 hours for the preparation of requests to charge, which weren't very long in this case.

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I know how fast I worked. The computer is probably right, but there is something wrong then. You just can't charge. I know our firm wouldn't and I know very few firms who could possibly bill clients at that rate.

Assuming that that had some relationship to what is reasonable and I think maybe it does. Of course, I believe that the other points that I have made in this case about it means a substantial discount ought to be taken into consideration and that to talk about these numbers with the verdict that was secured here in this case was crippling.

THE COURT: Was what?

MR. NESSEN: Would be crippling to some of these defendants. No question of it, and I do think that we are quite right and I am sorry to say it is so, it is another little lawsuit. Indeed, it is not so little.

THE COURT: No, it isn't.

MR. NESSEN: Yes, I would want complete documentary discovery. Maybe I should propound interrogatories or maybe it is easier, I don't believe in interrogatories myself, I suppose it is much easier to take a deposition of Mr. Wentzel and various people so that we don't bother your Honor with such time because I think credibility is not going to be in issue here. I don't think it is.

THE COURT: Let me just say this: I have got two things going on in my mind.

First, as a basic proposition I would start out assuming that your firm should be compensated for its work here the same as if it were billing a client. In other words, I think that the policy of the law is to award you fees that would compensate you or your firm, and your firm has I am sure worked out what is necessary to compensate the firm for the salaries and overhead and so forth and whatever profit figure you normally strive for.

I wouldn't like to see your firm come out not being so compensated. If it is $250,000 that is a fair compensation, so be it.

There is a second consideration. When a law firm or a group of lawyers decide to spend a number of hours, I think that is kind of prima facie, okay, I don't think we start second guessing them unless we have got good reason to.

The results here are some evidence that the time spent was necessary. It was a very well prepared and presented case.

I keep saying on all sides, I am not worrying about the defendants' fee application, but I just think for everybody's feelings' sake I want to emphasize that, but I am really dealing now with your side, Mr. Wentzel, and the case was beautifully presented, and so when the

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results tend to justify the time spent.

On the other hand, I find it surprising that this number of hours was involved, I must say, and I think some of Mr. Nessen's specific points are legitimate subjects of inquiry.

Another thing, I think that the hourly rate business should be further defined. I would like to know specifically during this time what would be the average rate for your time, for the types of associates that were on the case and so forth.

MR. NESSEN: Your Honor, may I point out, too, that some time was spent in 1970, '71 and '72. I think that is relevant at least for discovery purposes anyway to see what the billing rates were at that time. I know it has changed dramatically in our firm.

THE COURT: I said average rate. I agree with you. I think it is relevant.

Look, let's just, even if we can't end this up today, maybe we could just start exploring.

Let's take research, drafting and revisions of the trial memorandum, 470 hours.

MR. WENTZEL: Your Honor, --

THE COURT: You have heard my question.

MR. WENTZEL: Let me just comment briefly on how

I went about these things in my moving affidavit.

First of all, I don't think I defined -- let me start again. At one point I think I broke out how much time by partners, senior associate, junior associates and so forth, and I think perhaps Mr. Nessen pointed out that I never defined what I meant by senior associate and junior associate, and what I took there was as a senior associate was a man who had been with our firm for at least four years prior to working on the matter, and we have found in our firm that that is, in fact, about the time when we assign substantial responsibility to him and would call him a senior associate.

THE COURT: Yes.

MR. WENTZEL: Secondly, as far as breaking out the type of work that was performed, I came up with all those categories, that was very difficult to do because we record our time daily and in the course of a day I or anyone else working on this case may have had a conference with Mr. Peterman, we may have telephoned the defendants, we may have worked on the trial memorandum, we may have worked on the requests to charge, and I tried to make some estimate as I went through it without spending another 200 hours breaking it all down, which I couldn't do anyway, to assign the hours spent on that day to what looked like the

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predominant work that was done.

So those figures are approximate, but I think over the long run they probably average out to be about what was actually spent.

Now, as far as the next step goes, we have what we call the time sheets that come back from our computer service bureau here that describe what each attorney did in each day since this case came to our office. That is how I made all these calculations.

THE COURT: It seems to me it was -- I won't go that far. I just question whether it was a terribly liberal use of time.

MR. WENTZEL: There was far greater time on this case than I ever anticipated when I agreed to take it on. I will certainly say that.

We cranked up for trial on at least three separate occasions.

THE COURT: When were those?

MR. WENTZEL: One was last fall.

One was the date February 19 stands out in my mind I can't remember which year.

THE COURT: Of this year?

MR. WENTZEL: No, it was two or three years ago. I recall having a specific date for trial and I think that

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might have been when Judge Owen was appointed to the bench a month or two before that.

THE COURT: It could have been.

MR. WENTZEL: I forget which year that was.

MR. TURCHIN: He was appointed in January of '74.

MR. WENTZEL: The other date was before that when Judge Metzner, when Mr. Ruttenberg was still in the case, Judge Metzner set a trial date, and so our initial work was done then.

Then we cranked up again and then we cranked up again last fall and then we cranked up again for this trial.

I don't know what to say about it. I felt it was necessary. We had to go back and familiarize ourselves with work that we had done before and reevaluate our thinking. Each new defense attorney had different approaches to it.

I didn't hear, for instance, the concept of a legal right by the defendants to agree to cancel and so forth until Mr. Nessen came into the case, and I immediately sent a young man into the books and said, try to find me a case where a defendant ever won on the theory of a legal right in a group boycott situation. Has it ever been done before.

I think the car trade case emerged from that.

MR. NESSEN: It was in my brief. I don't know why you needed any research.

MR. WENTZEL: These were the kind of things that kept happening.

MR. NESSEN: Come on.

MR. WENTZEL: You don't have to accept our say.

MR. NESSEN: You are an honorable person but I am going to tell you before this Court awards you any money in no way am I not going to go through your time sheets and see what was logical and reasonable. No one, we discount and I have discounted in this case our hourly rate. You just can't bill General Motors or anybody unless -- yes, sur, you time sheets prima facie, but you have to look at what's the result of it.

I could nowhere bill any of my clients and still have them 17 hours for a note of issue. There may be a mistake there, but let's have discovery. I think we are kidding ourselves, your Honor.

THE COURT: On discovery, let's get a format and a time period.

MR. WENTZEL: Your Honor, I just want to say one other thing as far as discovery. I have no objection to Mr. Nessen looking at, for instance, my time sheets in this matter. I would have an objection I think to his copying them, and I say this for this reason:

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They do reflect the kinds of things that we have done, the kinds of things we were researching. In other words, what we would consider in a number of instances work product, and should there be an appeal and a new trial and so forth --

MR. NESSEN: May I assure you I would want copies so I could do my work at home. You will get them back. No one but me and my associate will look at them. We are not going to handle the appeal in this case and I can assure you that I will not show, unless there is an appeal taken from the judgment of awarding -- well, even then, I would assure you I would not show other counsel this.

THE COURT: There could be a little sensitivity because it might -- obviously it could in no sense be a part of the evidence that will be considered on the appeal on the merits of the case, but I suppose it could convey ideas, I don't know what it could convey.

I think there is probably a legitimate concern there, but could we please try to work that out.

MR. NESSEN: He can blank out anything.

THE COURT: I am sure Mr. Nessen will try to protect that.

Now, what do you want to do in the way of discovery? You want to look at the time records, right?

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MR. NESSEN: I would want initially to look at the time records.

THE COURT: What else?

MR. NESSEN: Well, I think that with the time records if Mr. Wentzel, I hate to do it to him, you know, would subject himself to a deposition, I don't believe in interrogatories myself. You just get nowhere with them.

MR. WENTZEL: I agree. I would rather take the hour or two for a deposition than spend all day trying to answer interrogatories anyway.

THE COURT: Why don't you do this. Due to the vacation situation, I am not going to get back to this matter until September. I think that it is a big matter and it is worth that time and we have got to get squared away on the interstate commerce point, so please when could you finish this process? You all have to have vacations, too.

MR. NESSEN: Let me say, your Honor, I am taking a sabbatical beginning September 1st and teaching at Columbia, but I will make myself available for this particular matter.

I do have to start preparing my courses.

THE COURT: Can we set a deadline that we should have this over. Let's set a deadline when it is possible

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that we are ready to come together again.

MR. NESSEN: When would your Honor be ready to hear us?

THE COURT: I won't be back until after the judicial conference. I will be back in the office -- I guess I will be back about the 8th, but I have to go away to the conference, so I will not be back before the 15th.

MR. NESSEN: Can we set September 8th as a date to finish up whatever we have to do?

THE COURT: That is fine. I can't meet with you then, but what I will need to have, I need to have the memos on the interstate commerce point. I need to have any revised presentations on the fee application and they ought to be in.

Can you have it all in on the 8th? That is wonderful.

MR. NESSEN: I will try. If I can't, I will ask your indulgence.

THE COURT: Let's have it either September 8th or very close to that.

MR. NESSEN: We certainly will have the discovery completed and your deposition.

THE COURT: Okay, that is a lot.

(Adjourned.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
TAXI WEEKLY, INC.,
:
Plaintiff,
:
v. : 66 Civ. 2827
:
METROPOLITAN TAXICAB BOARD OF
TRADE, INC., et al., :
:
Defendants. :
- - - - - - - - - - - - - - - - - - x

Before:

HON. THOMAS P. GRIESA,
District Judge

New York, New York
January 5, 1976 - 9:00 a.m.

APPEARANCES:

CASEY, LANE & MITTENDORF, Esqs.,
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-and-

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CHARLES A. LA TORELLA, JR., Esq.,
Attorney for Benjamin Botwinick

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THE COURT: On the record.

Let me just repeat. I started off the record.

Mr. Nessen called my home at about ten minutes to eleven last night saying that he has a bad knee and his doctor has urged him to not come to court this morning, and I know that knee injuries can be very sensitive and I told him to follow his doctor's orders.

At the same time I asked him to consider with his associate what additional elements needed to be put in the record on the various points this morning that were not already in the record.

I told him that I had intended to dictate a decision from the bench this morning and that we could be in touch with him on the telephone in some way.

Let us just try to get this morning's hearing organized.

I have before me and have read the affidavits on the fee application, namely, Mr. Wentzel's original affidavit of July 22, 1975, Mr. Nessen's affidavit of July 28, 1975.

Actually, I have not personally paid much attention to that because it was pretty well supported by his affidavit of October 21, 1975, and that's what I have concentrated on as far as Mr. Nessen's affidavit material.

Then I have a second affidavit of Mr. Wentzel October 28, 1975.

There is in the file the deposition of Mr. Wentzel consisting of three volumes. I have not read that.

And, of course, there are the memos of law.

Does anybody wish to submit any additional proof, including the deposition of Mr. Wentzel or parts thereof?

Does anybody wish to submit additional proof on the issue of the fee application?

MR. DOLINGER: Your Honor, my name is Michael Dolinger. I represent the defendants.

I simply request that the deposition of Mr. Wentzel and the exhibits attached thereto, as well as all papers filed with this Court in this litigation be made a part of the record.

THE COURT: I tell you, I am going to have to ask you to be more precise on that deposition. It is a long deposition and I am just --

MR. WENTZEL: If I may suggest, your Honor, I would be perfectly willing to have Mr. Dolinger designate pages and lines and then we can perhaps cross-designate any additional material that may be relevant.

THE COURT: Yes, I think so.

I think what we have here is a long deposition which I must assume was kind of exploratory, asking what things mean and so forth.

Subsequent to that Mr. Nessen, I assume, put what he considered his most powerful arguments into an affidavit.

MR. DOLINGER: That is true, your Honor.

THE COURT: So let us not just dump Mr. Wentzel's deposition into the record. I have to have a designation of relevant testimony.

MR. DOLINGER: Your Honor, in that case, I would simply request -- and I don't have a list of pages here -- that those pages cited in Mr. Nessen's affidavit of October 25, I think --

THE COURT: Let us go through. We can get out his affidavit.

MR. DOLINGER: The first reference that I see is on page 11, paragraph 17, to deposition pages 25 and 27.

THE COURT: All right.

I am going to mark in red on the file copy what I am going to admit.

MR. DOLINGER: The next reference is --

THE COURT:. Wait a minute now.

I take it you start on page 25, line 6, otherwise you would be --

MR. DOLINGER: Yes.

THE COURT: All right.

Is there any objection to this material, Mr. Wentzel?

MR. WENTZEL: No, I have no objection to it, your Honor.

THE COURT: All right.

MR. DOLINGER: I guess that should be 25, line 5.

THE COURT: Your typing may line up different than mine, but it begins with:

"Q Have you ever at any time attempted..." and so forth.

MR. DOLINGER: Yes.

THE COURT: All right. I have that marked.

We go to 27, the last answer?

MR. DOLINGER: Yes.

THE COURT: OK.

Now what else?

28 you have a reference, I assume, starting on line 7, "How, then, did you arrive at the $250,000 figure?" And down to the bottom of the page.

Do you want that in?

MR. DOLINGER: Where do you take that from, your

Honor?

THE COURT: The reference, I assume, is:

"Q How, then, did you arrive at $250,000 figure?"

MR. DOLINGER: Yes.

THE COURT: Any objection to that, Mr. Wentzel?

MR. WENTZEL: No, sir.

THE COURT: OK.

What is the next reference?

MR. DOLINGER: The next reference is to pages 14 through 18, beginning on 14 four lines from the bottom -- let me start:

"Now I would like to go through" which is the last large question on that page.

THE COURT: Where is your reference? Where is your reference?

MR. DOLINGER: Paragraph 26 of the affidavit there is a reference to pages 15 and 16. I see that really should run from 14 through --

THE COURT: Let me just interrupt you.

At page 14, at the top of the page, speaking of Mr. Nessen's affidavit, there is a reference to deposition page 15. We already have that.

THE COURT: OK. Then what is the next one?

MR. DOLINGER: The next one, in paragraph 26 of the affidavit, there is a reference to deposition 15-16.

However, I would request that that be expanded to cover questions beginning on page 14, the question being,

"Q Now, I would like to..." and running through the bottom of page 18.

THE COURT: All right. That is a description of the people listed in the computer printout.

I assume you have no objection to that?

MR. WENTZEL: No,sir.

THE COURT: So this is deposition page 14, line 17, through page 18 -- where, again, Mr. Dolinger, is this?

MR. DOLINGER: The bottom to page 18.

THE COURT: All right. No objection. That is received. Fine.

MR. DOLINGER: The next reference I see is in paragraph 32 of the affidavit, referring to pages 175 to 177 of the deposition.

I would start that with the first question on page 175.

THE COURT: All right. And going how far?

MR. DOLINGER: Through the question on page 178, starting "Am I correct in understanding" and the answer to that question.

THE COURT: Any objection to that material,

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Mr. Wentzel?

MR. WENTZEL: No, sir.

THE COURT: All right. So that is received.

175, line 10 through 178, line 22. OK.

MR. DOLINGER: The next reference is in paragraph 36 of the affidavit, deposition page 62.

I would start with the first full question on page 62 and run through the answer starting "I have not included my time."

THE COURT: Any objection, Mr. Wentzel?

MR. WENTZEL: I am not sure what it is relevant to, but it is a correct statement.

THE COURT: It is a concession that you are not seeking compensation for preparation of motion for attorney's fee. I think that is basically it.

MR. WENTZEL: That is correct. I said that in my affidavit as well.

THE COURT: All right.

Page 62, line 6 through page 62 line 18.

OK.

What else?

MR. DOLINGER: The next reference is from paragraph 42(a) on page 22 of the affidavit, with reference to deposition 53 to 55.

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I would start that on page 53 whereby Mr. Dolinger is seen in the middle of the page.

THE COURT: All right. How far would you go?

MR. DOLINGER: And continue through the answer, "Yes" on page 56 immediately proceeding the colloquy between Mr. Pratt and myself.

THE COURT: At line 17, is that right?

MR. DOLINGER: That is correct.

THE COURT: Any objection?

MR. WENTZEL: The only problem I have with this, your Honor, is that this passage relates to questions raised by specific entries in our time charges and I wouldn't want the record to appear incomplete, to have only this question or this series of questions on these particular entries get into the record and the whole deposition was this kind of question and answer.

You notice that these pages continue on.

I have no objection to this particular passage, but it seems to me to put just this passage in does not accomplish anything and may actually distort the record to some degree.

THE COURT: I don't want the record distorted, but one thing you are going to undistort is to state right now what is obvious, that there are many other time record entries and if nobody feels compelled to have the specifics of all these other things in, I don't think that anybody is going to draw inferences from it.

MR. WENTZEL: I just wanted to be clear.

THE COURT: We really don't want a lot of detail that isn't going to be ultimately helpful.

As far as I am concerned, I don't need all that detail, unless somebody has a psecific point that they want to make.

This was about specifically the work of this summer associate, Mr. Ozanne, and he is in a special category and I don't think it has anything much to do with work by you or Mr.Pratt, so let's receive that.

Page 53, line 12 through page 56, line 17. OK.

MR. DOLINGER: The next reference is in paragraph 42(c) on page 23. The reference is to deposition at 89-90.

THE COURT: All right, where on 89?

MR. DOLINGER: Let us begin at the question on the bottom of the page.

THE COURT: All right.

Again, we got a question about a specific point, Mr. Morin's work. Mr. Morin, I guess, was not a summer associate,but a fairly junior associate,right, Mr. Wentzel?

MR. WENTZEL: That is correct.

MR.DOLINGER: And running through the answer on page 90, starting "I think so."

THE COURT: Which ends at page 90, line 16.

All right, I will receive that.

Next.

MR. DOLINGER: The next reference is paragraph 42(d) which references to deposition at page 82 to 85.

THE COURT: This is about the note of issue?

MR. DOLINGER: Yes,sir.

Let us begin where it says "By Mr. Dolinger."

THE COURT: All right. Going how far?

MR.DOLINGER: Going through my statement on page 85, "Could you mark this, please?"

THE COURT: All right. That is received.

85 line 11 -- from 82,line 20 to 85, line 11.

MR. DOLINGER: The next reference is in paragraph 42(e).

MR. WENTZEL: Your Honor, excuse me. Could I add to that last designation and have it carry through to line 24 on page 87.

THE COURT: Yes. All right.

MR. DOLINGER: The next reference in paragraph 42(e), the reference is to deposition at 63.

THE COURT: OK. What lines?

MR. DOLINGER: Start with line 3 and go through line 15.

THE COURT: Page 63?

MR. DOLINGER: Yes.

THE COURT: Line 15 starts a question.

MR. DOLINGER: Let us make it line 14. I am assuming that that is what it was.

THE COURT: All right. I will receive that.

What else?

The top of page 25 in the affidavit you have a reference.

MR. DOLINGER: The next reference is to deposition at 88 to 90 at page 103.

THE COURT: Where do you start on page 88?

MR. DOLINGER: Start with line 17.

THE COURT: OK, I'll take that.

Then we included something already given on line 20 on page 89, so we will now include through 89, line 19.

MR. DOLINGER: Right.

THE COURT: Then you have a reference to 103?

MR. DOLINGER: This, incidentally, should run through to line 16 on page 95.

THE COURT: We got that in already.

What do you want on page 103, anything?

MR. DOLINGER: Yes. The reference is to lines 15 through 21.

THE COURT: All right. That is received.

MR. DOLINGER: The next reference in the same paragraph is to deposition at page 131.

THE COURT: All right.

I assume you want to end with line 23. Where do you want to start? Line 5?

MR. DOLINGER: Yes, line 5.

THE COURT: All right.

Page 131, lines 5 through 23.

MR. DOLINGER: The next reference is in paragraph 43(f) to page 94. That would simply be lines 21 through 23.

THE COURT: All right. That is received.

MR. WENTZEL: I am sorry, is that page 94?

THE COURT: Page 94. Just part of an answer, that's all. It is about the fact that Judge Metzner told you you should be ready to go to trial.

Do you want more of that?

MR. WENTZEL: Yes, your Honor. I would like to designate the complete question and answer.

THE COURT: All right. That is fair enough.

All right, line 19, through 96, line 7.

OK, Mr. Dolinger.

MR. DOLINGER: The next reference is paragraph 42(f) to deposition at 117, and the reference here would be to lines 3 through 11.

THE COURT: OK. That is in.

MR. DOLINGER: The next reference in the same paragraph is to deposition at pages 117-119.

I would start that at line 12 and continue it through page 19, line 9.

THE COURT: All right. OK, that's in.

MR. DOLINGER: The final reference is in paragraph 59 of the affidavit, the deposition at pages 42-43; start with line 19 and go through line 24 on page 43.

THE COURT: All right. That is for the defendant's designation in Mr. Wentzel's deposition, I take it.

Do you have anything you want to include, Mr. Wentzel?

MR.WENTZEL: Yes, your Honor.

In that last passage, I'd like to include the portion that continues over to page 44, line 16.

THE COURT: All right, we will do that. 44, line 16, OK.

Anything else?

MR.WENTZEL: No, sir.

THE COURT: Does any party wish to introduce any other evidence in connection with the attorney's fee application?

MR. WENTZEL: Your Honor, I would like to testify briefly on the direct examination to be conducted by Mr. Jensen.

THE COURT: All right.

Let me ask Mr. Dolinger. Do the defendants intend to call any witnesses?

MR. DOLINGER: No, your Honor.

THE COURT: OK.

THE COURT: What I would like us to come back to is -- I should have probably started with the interstate Commerce issue anyway.

MR. WENTZEL: If I may, your Honor, I have an immediate problem,and that is I am out on trial in Minnesota this morning and I have to catch a plane back there as quickly as possible this morning, so I would like to complete my part of this hearing as soon as possible so that I can leave and Mr. Pratt and Mr. Jensen can carry on.

THE COURT: When do you have to leave?

MR. WENTZEL: If I can get the 11:40 plane, I shall try it. If not, I will try to get one after that, which is an hour later.

THE COURT: OK.

MR. WENTZEL: Mr.Pratt is prepared to take care of the interstate commerce portion of the hearing, but --

THE COURT: I would just like to know where we stand, even in connection with the fee application.

Frankly, I had expected to -- even though I got into this bit first about the deposition and all, I would like to finish the interstate commerce point,then go to the fee application. So let me just pause for just a moment on that.

What proof or stipulations, what does anybody want to introduce on the interstate commerce?

Are you ready with a stipulation?

MR. PRATT: Your Honor, in the middle of the month of December, we forwarded a proposed stipulation to the defendants.

Until today, in fact, I have not heard a word from them.

THE COURT: I expected to have this hearing start with a stipulation on the bare facts contained in those schedules which we went through at a conference some weeks ago, and the reason I was willing to accommodate everybody and set a hearing on January 5 and assumed that it could be done quickly was on the assumption that

I would have those stipulations in hand. Those were the kind of facts that should be stipulated if anybody devoted any reasonable effort and intelligence to it.

Where are the stipulations?

MR. DOLINGER: Your Honor, I had spoken with Mr. Nessen and I understood from him that the problem that arose with regard to the stipulations was that he received a copy of them in Vermont about a week and a half ago; he then received while he was in Vermont a call from the Rosenman firm which was to represent a number of defendants on appeal and they wished to confer with him with regard to certain items in the stipulations.

Upon his arrival back to New York on Friday, he attempted to contact people at the Rosenman firm who are in charge of the case. None of them were available.

He attempted to contact Mr. Pratt and Mr. Wentzel the same day, and he couldn't reach them either.

Basically, what Mr. Nessen proposes to do is to consult today with the Rosenman firm to suggest an alteration simply of the language of certain of the introductory paragraphs on that stipulation.

We don't anticipate that there will be any problem with the data itself.

THE COURT: I want that settled right now and I gt:mg

mean you can get on the telephone and I want that stipulation concluded.

I tell you that I expected that all of that so-called consultation involving whoever it had to involve was to be finished by nine o'clock this morning and there was absolutely no reason in anything you have told me to excuse the failure to do that.

I don't care if Mr. Wentzel and Mr.Pratt were absent from their office on Friday. Friday was a very awkward date to start calling them. I don't care. A lot of offices were closed, including this office, and you had a responsibility.

I would vastly have preferred any day but today was better for me for this hearing, many, many days in the past, and I am not going to have it go another day.

I am sympathetic to Mr. Nessen's knee problem because I don't want the loss of motion of his knee or to have any problems, but that is not the problem we are talking about, and I am not sympathetic to a delay until Friday or thereabouts to have this so-called consultation.

I accommodated Mr. Nessen so he could have a clear Christmas and New Year's vacation in Vermont,but that was not to hold up the stipulation.

Now you figure out a way to get that stipulation revised and get it on the record this morning. I don't care what you do, but you do it. We will go ahead and take Mr. Wentzel's testimony on the fee application, and I am going to consider for the sake of the fee application that this labor in the District Court is over today and that there will be no need for hours and hours of testimony and attorneys' work to develop facts about whether a certain ad was placed involving the Chrysler Motor Car Company on a certain date or total ads. I will assume that those stipulations are in.

I am assuming, therefore, that those raw facts about advertising and whatever is contained in those schedules, that will be in.

I don't care what the preamble is as long as it simply recites the facts that are evidenced from documents.

With that out of the way, what evidence does anyone wish to introduce about Interstate Commerce?

MR. PRATT: Your Honor, I wish to ask Mr. Peterman hopefully about five or so questions that really are the foot of the stipulation, but they are outside of the tables. There are other points. I think we can do it here quickly.

THE COURT: What evidence does the defense wish to introduce, if any?

MR. DOLINGER: The defense,your Honor, does not plan to introduce evidence at this time.

THE COURT: OK, fine.

All right, Mr. Wentzel, let us go back. We will complete the record on the fee application right now.

Let me just interrupt.

I would like to have-- and you may be intending to put this in, but I would like to have in the record an up-to-date computer printout of the Casey Lane firm which corresponds with the figures in your last affidavit.

MR. JENSEN: Yes, your Honor.

The prime purpose of having Mr. Wentzel testify this morning is to do just that and to give you an opportunity to ask whatever questions you have as to abbreviations and methods of computing and so forth.

THE COURT: All right, fine.

MR. LaTORELLA: If your Honor please, may I interject, sir, for just one second?

THE COURT: Yes.

MR. LaTORELLA: My name is LaTorella. I am of counsel for the purpose of representing Benjamin Botwinick.

I anticipated that the Casey Lane & Mittendorf case was over at this point. I think it is fair to point out that just this morning I served motion papers under Rule 5 and 59 for judgment notwithstanding the verdict or in the alternative for a new trial.

I have them ready for this morning. I do not wish to interject or do anything out of order, but I do think the Court would like to have that in mind before considering closing all evidence on the attorneys' fees.

THE COURT: Look, I knew that such a motion was coming.

I must in all candor tell you that I will review the motion, but what I am telling you in candor is that I think that it would surprise me greatly if any basis were really raised for overturning the work we did previously.

I don't want to prejudge a motion which I have not read, but I just have to proceed on the fee basis. I am not going to hold up a ruling on the fee application.

MR. LaTORELLA: I understand, your Honor.

THE COURT: Let me just explore.

What happens as far as an appeal? If the defendants appeal and then you will, obviously, more work on the appeal?

MR.JENSEN: Yes, your Honor.

THE COURT: What happens? Does the Court of Appeals award fees on that or does it come back to the